Supreme Court, U. S.
FILED
AUG 16 1979
ROOAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1840

CITY OF ROME, BRUCE HAMLER, AND H. F. HUNTER, JR.,
Appellants,

v.

UNITED STATES OF AMERICA, GRIFFIN B. BELL, Attorney General of the United States, and DREW S. DAYS III, Assistant Attorney General of the United States,
Appellees.

On Appeal From the United States District Court for the District of Columbia

BRIEF FOR THE APPELLANTS

ROBERT M. BRINSON
City Attorney of Rome, Georgia
Brinson, Askew & Berry
200 North Fifth Avenue
Rome, Georgia 30161
(404) 291-8853

WILLIAM E. SUMNER
BURTON B. GOLDSTEIN, JR.
BARBARA A. SPECK
Long, Aldridge, Heiner, Stevens & Sumner
1900 Rhodes-Haverty Building
Atlanta, Georgia 30303

JOSEPH W. DORN
Kilpatrick & Cody
2033 K Street, N.W.
Suite 400
Washington, D.C. 20006

Counsel for Appellants

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

Page

Opinions Below 2

Jurisdiction 2

Constitutional Provisions, Statutes, and Regulations Involved 3

Questions Presented 4

Statement 5

I. Parties to this Action 5

II. The Electoral Changes at Issue 8

III. The Annexations at Issue 12

IV. Elections Held Under the Changes at Issue 15

V. Administrative and Judicial Proceedings 16

VI. Summary 19

Summary of Argument 19

Argument 24

I. Electoral Changes and Annexations Enacted Without Discriminatory Purpose Are Not Prohibited by Section 5 of the Act 24

II. Municipalities Located In States Covered By the Provisions of the Act Can Independently Bailout From the Coverage of the Act 38

III. Congress Is Not Empowered Under Section Two of the Fifteenth Amendment of the Constitution to Prohibit Electoral Changes and Annexations Found to be Enacted Without Discriminatory Purpose 46

A. Section One of the Fifteenth Amendment does not confer a federally created right to vote but prohibits intentional discrimination 47

Page

B. Congress has no power to expand the normative content of Section One of the Fifteenth Amendment to prohibit electoral changes or annexations solely on the basis of disproportionate racial impact 53

(i) The Reconstruction Era Cases 56

(ii) The Remedial Legislation from 1957 to 1964 59

(iii) Cases Construing the Voting Rights Act of 1965 60

C. Congress may not through the creation of irrebuttable presumptions of invidious purpose proscribe actions having only a racially disproportionate impact 66

D. Summary 67

IV. Section 5 of the Act Unconstitutionally Intrudes Upon Basic Concepts of Federalism and Rights Guaranteed by the First, Fifth, Ninth, and Tenth Amendments of the Constitution 68

A. Section 5 encroaches upon basic concepts of Federalism 73

B. The operation of Section 5 seriously infringes upon the constitutional rights of Private Appellants 84

V. The Electoral Changes and Annexations Presently Before This Court Have Been Precleared by the Attorney General 89

A. Preclearance of the Georgia Municipal Election Code 90

B. Failure by the Attorney General to Object in a Timely Manner 93

CONCLUSION 97

APPENDIX A 1a

APPENDIX B 1b

APPENDIX C 1c

Page

CASES:

Alabama v. *United States*, 304 F.2d 583 (5th Cir.), *aff'd per curiam*, 371 U.S. 37 (1962) 59

Allen v. *State Board of Elections*, 393 U.S. 544 (1969) 16, 42, 69, 75, 79, 80, 85, 87

Andrus v. *Sierra Club*, 47 U.S.L.W. 4676 (U.S. June 11, 1979) (No. 78-625) 45

Baker v. *Carr*, 369 U.S. 186 (1962) 9, 77, 78

Bate Refrigerating Co. v. *Sulzberger*, 157 U.S. 1 (1895) 45

Bauers v. *Heisel*, 361 F.2d 581 (3d Cir. 1966), *cert. denied*, 386 U.S. 1021 (1967) 77

Beer v. *United States*, 425 U.S. 130 (1976) 28, 32, 53, 56, 61, 69

Berry v. *Doles*, 438 U.S. 190 (1978) 16, 79, 80, 85

Blacks United for Lasting Leadership, Inc. v. *City of Shreveport*, 571 F.2d 248 (5th Cir. 1978) 21, 49

Bolden v. *City of Mobile*, 571 F.2d 238 (5th Cir.), *prob. juris. noted*, 47 U.S.L.W. 3221 (U.S. Oct. 3, 1978) (No. 77-1844) 21, 49

Briscoe v. *Bell*, 432 U.S. 404 (1978) 38

Brown v. *Board of Education*, 347 U.S. 483 (1954) ... 62

Brown v. *Environmental Protection Agency*, 521 F.2d 827 (9th Cir. 1975), *vacated and remanded per curiam*, 431 U.S. 99 (1977) 77

Buckley v. *Valeo*, 424 U.S. 1 (1976) 87

Caminetti v. *United States*, 242 U.S. 470 (1917) 45

Carrington v. *Rash*, 380 U.S. 89 (1965) 62

Castaneda v. *Partida*, 430 U.S. 482 (1977) 28

Charlton County Board of Education v. *United States*, 459 F. Supp. 530 (D.D.C. 1978) 35

City of Madison v. *Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976) 85

Page

City of Petersburg v. *United States*, 354 F. Supp. 1021 (D.D.C. 1972), *aff'd*, 410 U.S. 962 (1973) 13

City of Richmond v. *United States*, 422 U.S. 358 (1975) 13, 35, 47

City of Rome v. *Bell*, No. C-76-159-C (N.D. Ga. Feb. 24, 1977) 17

City of Rome v. *United States*, 450 F. Supp. 378 (D.D.C. 1978) 2, 3

City of Rome v. *United States*, No. 77-0797 (D.D.C. Apr. 9, 1979) 2, 18, 80

The Civil Rights Cases, 109 U.S. 3 (1883) 57

Cleveland Board of Education v. *LaFleur*, 414 U.S. 632 (1974) 28

Ex parte Collett, 337 U.S. 55 (1949) 45

Columbus Board of Education v. *Penick*, 47 U.S.L.W. 4924 (U.S. July 2, 1979) (No. 78-610) 21, 49, 79

Dallas County v. *Reese*, 421 U.S. 477 (1975) 32

Dawson v. *Vance*, 329 F. Supp. 1320 (S.D. Tex. 1971).. 77

Dougherty County Board of Education v. *White*, 99 S.Ct. 368 (1978) 69

In re Duncan, 139 U.S. 449 (1891) 76, 77

Dunn v. *Blumstein*, 405 U.S. 330 (1972) 87

Duren v. *Missouri*, 99 S. Ct. 664 (1979) 28

Dusch v. *Davis*, 387 U.S. 112 (1967) 9, 32

Dusch v. *Davis*, 361 F.2d 495 (4th Cir. 1966), *rev'd*, 387 U.S. 112 (1967) 9

Elrod v. *Burns*, 427 U.S. 347 (1976) 87

First National Bank v. *Bellotti*, 435 U.S. 765 (1978)..87, 88

Fitzpatrick v. *Bitzer*, 427 U.S. 445 (1976) 74

Fry v. *United States*, 421 U.S. 542 (1975) 70

Furnco Construction Corp. v. *Waters*, 438 U.S. 567 (1978) 28

Page

Gaffney v. *Cummings*, 412 U.S. 735 (1973) 37

Georgia v. *United States*, 411 U.S. 526 (1973) 69, 79, 81, 82, 86, 94, 96

Gomillion v. *Lightfoot*, 364 U.S. 339 (1960) 21, 47, 50

Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971) 28

Hannah v. *Larche*, 363 U.S. 420 (1960) 59

Harper v. *Virginia Board of Elections*, 383 U.S. 663 (1966) 62, 87

Heikkila v. *Barber*, 345 U.S. 229 (1953) 83

Heiner v. *Donnan*, 285 U.S. 312 (1932) 27

Helvering v. *Gerhardt*, 304 U.S. 405 (1938) 78

Home Building & Loan Association v. *Blaisdell*, 290 U.S. 398 (1934) 69, 70

Hutto v. *Finney*, 437 U.S. 678 (1978) 74

Illinois State Board of Elections v. *Socialist Workers Party*, 47 U.S.L.W. 4197 (U.S. Feb. 22, 1979) (No. 77-1248) 87

International Brotherhood of Teamsters v. *United States*, 431 U.S. 324 (1977) 28

James v. *Bowman*, 190 U.S. 127 (1903) 58

Jefferson v. *Hackney*, 406 U.S. 535 (1972) 67

Katzenbach v. *Morgan*, 384 U.S. 641 (1966) 46, 56, 61, 62, 63, 66

Logan v. *United States*, 144 U.S. 263 (1892) 57

Los Angeles Department of Water and Power v. *Manhart*, 435 U.S. 567 (1978) 28, 35

Louisiana v. *United States*, 380 U.S. 145 (1965) ..59, 60, 62

Lubin v. *Panish*, 415 U.S. 709 (1974) 31

Luther v. *Borden*, 48 U.S. (7 How.) 1 (1849) 76, 77

MacKenzie v. *Hare*, 239 U.S. 299 (1915) 45

Page

Maryland v. *Environmental Protection Agency*, 530 F.2d 215 (4th Cir. 1975), *vacated and remanded per curiam sub nom. Environmental Protection Agency* v. *Brown*, 431 U.S. 99 (1977) 77

Maryland v. *Wirtz*, 392 U.S. 183 (1968) 70

Massachusetts v. *United States*, 435 U.S. 444 (1978) .. 78

McCulough v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) 78

McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973) 28

Morris v. *Gressette*, 432 U.S. 491 (1977) 17, 69, 81, 82, 88, 90

National League of Cities v. *Usery*, 426 U.S. 833 (1976) 70, 74, 75, 78, 81

Nevett v. *Sides*, 571 F.2d 209 (5th Cir.), *pet. for cert. filed*, 47 U.S.L.W. 3283 (U.S. Oct. 24, 1978) (No. 78-492) 21, 49, 50

Nixon v. *Condon*, 286 U.S. 73 (1932) 62

Nixon v. *Herndon*, 273 U.S. 536 (1927) 62

Oregon v. *Mitchell*, 400 U.S. 112 (1970) .....*passim*

Perkins v. *Matthews*, 400 U.S. 379 (1971) 13, 16, 75, 79

Personnel Administrator v. *Feeney*, 47 U.S.L.W. 4650 (U.S. June 5, 1979) (No. 78-233) 21, 48, 58

Regents of the University of California v. *Bakke*, 438 U.S. 265 (1978) 35

Reynolds v. *Sims*, 377 U.S. 533 (1964) 9, 35, 87

Rosario v. *Rockefeller*, 410 U.S. 752 (1973) 87

St. Joseph Stockyards Co. v. *United States*, 298 U.S. 38 (1936) 83

Skinner v. *Oklahoma*, 316 U.S. 535 (1942) 27

Snyder v. *Massachusetts*, 291 U.S. 97 (1934) 89

South v. *Peters*, 339 U.S. 276 (1950) 35

South Carolina v. *Katzenbach*, 383 U.S. 301 (1966) ..*passim*

Page

Stanley v. *Illinois*, 405 U.S. 645 (1972) 27

Tennessee Valley Authority v. *Hill*, 437 U.S. 153 (1978) 45

Thomasville Branch of NAACP v. *Thomas County*, 571 F.2d 257 (5th Cir. 1978) 21, 49

Truax v. *Corrigan*, 257 U.S. 312 (1921) 84

Turner v. *City of Memphis*, 369 U.S. 350 (1962) 62

Turner v. *Utah Department of Employment Security*, 423 U.S. 44 (1975) 28

United Jewish Organizations v. *Carey*, 430 U.S. 144 (1977) 31, 34, 36, 53, 69

United Public Workers v. *Mitchell*, 330 U.S. 75 (1947) 89

United States v. *Board of Commissioners*, 435 U.S. 110 (1978) (sometimes cited as *Sheffield*) .....*passim*

United States v. *First National Bank*, 234 U.S. 245 (1914) 45

United States v. *Georgia*, No. C76-1531A (N.D. Ga. Sept. 30, 1977), *aff'd mem.*, 98 S. Ct. 2840 (1978) .92, 93

United States v. *Harris*, 106 U.S. 629 (1883) 58

United States v. *McElveen*, 180 F. Supp. 10 (E.D. La.), *aff'd per curiam sub nom. United States* v. *Thomas*, 362 U.S. 58 (1960) 59

United States v. *Mississippi*, 380 U.S. 128 (1965) 59

United States v. *Raines*, 362 U.S. 17 (1960) 59

United States v. *Reese*, 92 U.S. 214 (1875) 58

United States v. *Rutherford*, 47 U.S.L.W. 4724 (U.S. June 11, 1979) (No. 78-605) 45

United Steelworkers v. *Weber*, 47 U.S.L.W. 4851 (U.S. June 27, 1979) (Nos. 78-432, 78-435, 78-436) 33, 34

Usery v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) 28

Village of Arlington Heights v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) 21, 48, 49

Vlandis v. *Kline*, 412 U.S. 441 (1973) 27

Page

Vollin v. *Kimbel*, 519 F.2d 790 (4th Cir.), *cert. denied*, 423 U.S. 936 (1975) 32

Washington v. *Davis*, 426 U.S. 229 (1976) 21, 48, 49

Weinberger v. *Salfii*, 422 U.S. 749 (1975) 28

Wesberry v. *Sanders*, 376 U.S. 1 (1964) 87

Whitcomb v. *Chavis*, 403 U.S. 124 (1971) 30, 32, 53

White v. *Regester*, 412 U.S. 755 (1973) 29, 32, 53

Wilkes County v. *United States*, 450 F. Supp. 1171 (D.D.C.), *aff'd* 99 S.Ct. 606 (1978) 69

Wilson v. *New*, 243 U.S. 332 (1917) 69, 70

Wright v. *Rockefeller*, 376 U.S. 52 (1964) 21, 47, 50

Ex parte Yarbrough, 110 U.S. 651 (1884) 57

Yick Wo v. *Hopkins*, 118 U.S. 356 (1886) 87

Zimmer v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973), *aff'd sub nom. East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976) 29, 30, 32

UNITED STATES CONSTITUTION:

U.S. CONST. art. IV, § 4 .....*passim*

U.S. CONST. art. IV, § 2 64

U.S. CONST. amend. I .....*passim*

U.S. CONST. amend. V .....*passim*

U.S. CONST. amend. IX .....*passim*

U.S. CONST. amend. X .....*passim*

U.S. CONST. amend. XI 74

U.S. CONST. amend. XIV .....*passim*

U.S. CONST. amend. XV .....*passim*

STATUTES:

Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (1871) 55, 58

Act of Feb. 8, 1894, 28 Stat. 36 (1894) 55

Page

Civil Rights Act of 1875, Act of March 1, 1875, ch. 114, §§ 3-5, 18 Stat. 336, 337 (1875) (current version of § 5 at 42 U.S.C. § 1984 (1970)) 55, 56

Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (codified in scattered sections of 5, 28, 42 U.S.C. (1970)) 55

Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (codified in scattered sections of 18, 20, 42 U.S.C. (1970)) 55

Civil Rights Act of 1964, Pub. L. No. 8-352, 78 Stat. 241 (codified in scattered sections of 28, 42 U.S.C. (1970)) 55, 59

Enforcement Act of 1870, Act of May 31, 1870, ch. 114, 16 Stat. 140 (1870), *as amended by* Act of Feb. 28, 1871, ch. 99, 16 Stat. 433 (1871) (current versions at 42 U.S.C. §§ 1981, 1983 (1970)) 50, 55, 58

Mandamus and Venue Act of 1962, 28 U.S.C. § 1362 (1970) 17

42 U.S.C.A. § 1973b (Cum. Supp. 1974 to 1978) ....*passim*

42 U.S.C.A. § 1973c (Cum. Supp. 1974 to 1978) ....*passim*

42 U.S.C.A. § 1973l (1974 & Cum. Supp. 1974 to 1978) 17

42 U.S.C.A. §§ 2000e-2000e-17 (1974 & Cum. Supp. 1974 to 1978) 28

GA. CODE ANN. § 2-1309 (1977) 86

GA. CODE ANN. § 34-102 (1970) 92

GA. CODE ANN. § 34-1015 (1970) 92

GA. CODE ANN. § 34-1513 (Cum. Supp. 1979) 92

1964 GEORGIA LAWS 174 (current version at GA. CODE ANN. § 34-1513 (Cum. Supp. 1979)) 8

GA. CODE ANN. § 34A-102 (1970) 4, 11

GA. CODE ANN. § 34A-902 (1970) 4, 11

GA. CODE ANN. § 34A-1407 (Cum. Supp. 1979) 4, 11

GA. CODE ANN. § 47-801 (1979) 86

Page

GA. CODE ANN. §§ 69-309 to 310 (1976 & Cum. Supp. 1979) 91

GA. CODE ANN. § 69-1018 (1976) 8

REGULATIONS:

28 C.F.R. § 51 (1978) 4, 81, 94, 95

30 Fed. Reg. 9897 (1965) 24

LEGISLATIVE MATERIAL:

CONG. GLOBE, 40th Cong., 3d Sess. (1869) 51, 52, 53

CONG. GLOBE, 41st Cong., 2d Sess. (1870) 51, 52, 54, 55

CONG. GLOBE, 41st Cong., 3d Sess. 1871) 54

CONG. GLOBE, 42d Cong., 1st Sess. (1871) 54

Hearings on H.R. 939 et al. Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 94th Cong., 1st Sess., Ser. 1 (1975) 82, 85

Hearings on H.R. 6400 Before Subcomm. No. 5 of the House Comm. on the Judiciary, 89th Cong., 1st Sess. (1965) 27

Hearings on S. 407 et al. Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. (1975) 71, 72

Hearings on S. 1564 Before the Senate Comm. on the Judiciary, 89th Cong., 1st Sess. (1965) 27

SENATE JOURNAL, 40th Cong., 3d Sess. (1869) 51, 53

S. Rep. No. 94-295, 94th Cong., 1st Sess. (1975) 72

Page

MISCELLANEOUS:

U.S. Bureau of the Census, *Current Population Reports, Series P-20, No. 253, Voting and Registration in the Election of November 1972* (1973) 72

U.S. Bureau of the Census, *Current Population Reports, Series P-20, No. 322, Voting and Registration in the Election of 1976* (1978) 72

U.S. Bureau of the Census, *Current Population Reports: Special Studies, Series P-23, No. 74, Registration and Voting in November, 1976 in Jurisdictions Covered by the Voting Rights Act Amendments of 1975* (1978) 72

Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81 56

Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199 (1971) 56

Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975) 56

Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947) 46

H. HART & A. SACKS, THE LEGAL PROCESS (tent. ed. 1958) 46

Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975) 56

Note, United Jewish Organizations v. Carey *and the Need to Recognize Aggregate Voting Rights*, 87 YALE L.J. 571 (1978) 37

Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930) 46

Sentell, *Reapportionment and Local Government*, 1 GA. L. REV. 596 (1967) 9

Page

Thernstrom, *The odd evolution of the Voting Rights Act*, THE PUBLIC INTEREST 49 (Spring 1979) ..33, 37, 84

L. TRIBE, A TREATISE ON AMERICAN CONSTITUTIONAL LAW (1978) 31, 74

U.S. COMMISSION ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER (1975) 71

Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954) 78

Deposition of Horace Clary 9, 10

Deposition of H. F. Hunter, Jr. 9

Brief for the United States, United States v. Board of Commissioners, 435 U.S. 110 (1978) 44

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1840

CITY OF ROME, BRUCE HAMLER, AND H. F. HUNTER, JR.,
Appellants,

v.

UNITED STATES OF AMERICA, GRIFFIN B. BELL, Attorney General of the United States, and DREW S. DAYS III, Assistant Attorney General of the United States,
Appellees.

On Appeal From the United States District Court for the District of Columbia

---

BRIEF FOR THE APPELLANTS

This case requires determination of the impact of Section 5 of the Voting Rights Act of 1965 (the "Act"), under its terms and the Constitution, upon a political subdivision innocent of purposeful racial discrimination. The Act, as administered by the Justice Department, has prevented elections in the City of Rome for over four years. Appellants seek to restore democratic government to the citizens of Rome.

Appellants submit that a variety of corrective determinations are available to this Court, including construction of the Act in a manner that does not proscribe actions innocent of illegal purpose, exemption of Rome from the Act, declaration of Section 5 as now unconstitutional, and finding that the matters at issue have, in fact, been approved by the Attorney General of the United States. Section 5 of the Act was designed to insure that the goals of the Fifteenth Amendment would no longer be frustrated by undemocratic devices. Section 5 has become, in effect, an affront to the principles of constitutional Federalism, the inherent right of American citizens lawfully to conduct their local governmental affairs, and the consensual belief that parties, themselves proven innocent, ought not categorically be presumed guilty.

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia rendered on February 22, 1978, which appears beginning at p. 1a of Appellants' Jurisdictional Statement, is reported in 450 F. Supp. 378 (D.D.C. 1978). The opinion of that court rendered on April 9, 1979, which appears beginning at p. 1b of Appellants' Jurisdictional Statement, is presently unreported.

JURISDICTION

This suit seeks a declaratory judgment pursuant to Section 4 of the Voting Rights Act of 1965 (the "Act"), 42 U.S.C. 1973b, and Section 5 of the Act, 42 U.S.C. 1973c. On February 22, 1978, the three-judge district court dismissed the portion of Appellants' complaint which contended that the Attorney General of the United States unconstitutionally applied Section 5

of the Act to the City of Rome. 450 F. Supp. 378 (D.D.C. 1978). See Jurisdictional Statement at 13a (hereinafter cited as "Juris. State."). On April 4, 1979, the court denied Appellants' motion for summary judgment, granted the motion for summary judgment of Appellees with respect to the balance of Appellants' complaint, and dismissed Appellants' case. See Juris. State. at 1b. A notice of appeal to this Court was duly filed in the United States District Court for the District of Columbia on May 2, 1979. See Juris. State. at 1f.

An appeal was docketed in this Court on June 7, 1979, within ninety days from the final order of the court below dismissing the case. The Appellants' Jurisdictional Statement was filed on that date, invoking the jurisdiction of this Court under 42 U.S.C. § 1973b (a) and 42 U.S.C. § 1973c. This Court noted probable jurisdiction in an Order dated July 2, 1979.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Article IV, Section 4, and the First, Fifth, Ninth, Tenth, Fourteenth, and Fifteenth Amendments of the Constitution of the United States of America are set forth in full beginning at p. 1a *infra*.

Section 4 and Section 5 of the Voting Rights Act of 1965, Pub. L. No. 89-110, Title I, §§ 4 and 5, 79 Stat. 438-439, *as amended by* Pub. L. No. 91-285, §§ 3-5 (June 22, 1970), 84 Stat. 315, *as amended by* Pub. L. No. 94-73, §§ 101, 201-203, 204, 206, 405 (Aug. 6, 1975), 89 Stat. 400-402, 404 [codified at 42 U.S.C.A. §§ 1973b and 1973c (Cum. Supp. 1974 to 1978)], are set forth in full beginning at p. 1c of Appellants' Jurisdictional Statement. Certain provisions of the Georgia Munici-

pal Election Code, which were precleared by the Attorney General of the United States, 1968 GEORGIA LAWS 885, 887, GA. CODE ANN. § 34A-102 (1970); 1968 GEORGIA LAWS 885, 913-914, GA. CODE ANN. § 34A-902 (1970); 1968 GEORGIA LAWS 885, 977-978, 1970 GEORGIA LAWS 341, 344, 1974 GEORGIA LAWS 82, 94, 1978 GEORGIA LAWS 1025, 1031, GA. CODE ANN. § 34A-1407 (Cum. Supp. 1979), are set forth in full beginning at p. 1d of Appellants' Jurisdictional Statement. The changes to the Charter of the City of Rome which have been objected to by the Attorney General, 1966 GEORGIA LAWS 2375-2378, 2382-2386, 2815-2819, 3083-3087; 1967 GEORGIA LAWS 3296-3298; 1970 GEORGIA LAWS 2563-2566; 1971 GEORGIA LAWS 3664-3666, are set forth in full beginning at p. 1e of Appellants' Jurisdictional Statement.

Part 51 of the regulations of the Department of Justice, 28 C.F.R. Part 51 (1978), *Procedures for the Administration of Section 5 of the Voting Rights Act of 1965*, is set forth in full beginning at p. 1b *infra*.

QUESTIONS PRESENTED

1. Whether electoral changes and annexations, enacted without discriminatory purpose, are prohibited by Section 5 of the Act.
2. Whether municipalities located in states covered by the provisions of the Act can independently bailout from the coverage of the Act.
3. Whether Congress is empowered, pursuant to Section Two of the Fifteenth Amendment of the Constitution, to prohibit electoral changes and annexations found to be enacted without discriminatory purpose.

4. Whether Section 5 of the Act intrudes upon basic concepts of Federalism and rights guaranteed by the First, Fifth, Ninth, and Tenth Amendments of the Constitution.
5. Whether the Attorney General of the United States precleared the electoral changes and annexations presently before the Court.

STATEMENT

This action is brought by the City of Rome, a municipality situated in Floyd County, northwestern Georgia. Despite findings by the court below that Rome is innocent of any purposeful discrimination and that Rome has not used any test or device to deny or abridge the right to vote, that court refused to approve the electoral changes and annexations here at issue and refused to exempt Rome from the Act.

I. Parties to this Action.

Rome is a city of 30,759 persons, of whom 23,543, or 76.6 percent, are white and 7,216, or 23.4 percent, are black. Juris. State. at 4b. The voting age population is 79.4 percent white and 20.6 percent black. *Id.*[1] As of 1975, Rome had 13,097 registered voters, of whom 83.9 percent were white and 15.5 percent were black. *Id.*

The Rome city government's behavior with respect to black citizens was described by Judge Carl McGowan, writing for the three-judge court below. He determined that no test or device, as that term is defined in the Act, had been used in Rome to deny or abridge the right

[1] This population data was developed from the 1970 census. Juris. State. at 4b.

to vote for at least seventeen years. *Id.* at 5b. Judge McGowan also determined that Rome carried its burden of proving that the electoral changes were enacted without a racially discriminatory purpose, *id.* at 32b n.69, 45b, and noted that the United States admitted the absence of any racially discriminatory purpose for the annexations. *Id.* at 49b.

Supporting the court's two central determinations were eighteen subsidiary findings of fact describing the City's behavior: (1) "no literacy test or other device has been employed in Rome as a prerequisite to voter registration during the past seventeen years," *id.* at 5b;[2] (2) "the City has not employed other barriers to registration with respect to time and place, registration personnel, purging, or reregistration," *id.* at 6b; (3) "there have been no other direct barriers to black voting in Rome," *id.* at 7b; (4) "[i]ndeed whites, including City officials, have encouraged blacks to run for elective posts in Rome," *id.*; (5) "white elected officials of Rome, together with the white appointed City Manager, are responsive to the needs and interests of the black community," *id.*; (6) "[t]he City has not discriminated against blacks in the provision of services," *id.*; (7) "[the City] has made an effort to upgrade some black neighborhoods," *id.*; (8) " the City transit department, with a predominantly black ridership is operated through a continuing City subsidy," *id.* at 6b; (9) "the racial composition of the City workforce approximates that of the population, with a number of

[2] Indeed, the uncontradicted evidence, indicating the absence of the use of any such test or device, including a literacy test, extends at least forty years, this being the period of memory of living registration personnel and black citizens. Juris. State. at 6b and footnotes contained therein.

blacks employed in skilled or supervisory positions," *id.* at 7b-8b; (10) "[i]n Rome politics, the black community, if it chooses to vote as a group, can probably determine the outcome of many, if not most contests;" *id.* at 8b, (11) "blacks often hold the balance of power in Rome elections," *id.* at 55b; (12) "[t]hus many white candidates vigorously pursue the support of black voters," *id.* at 8b, *see also id.* at 55b; (13) "[blacks] are situated to assert considerable influence over many elected officials, not simply those representing an exclusive black constituency," *id.* at 55b; (14) "[a]lso probative of the lack of discrimination in registration is the fact that black registration remained at a relatively high level throughout the period 1963-74," *id.* at 6b; (15) "[b]lacks have not been denied access to the ballot through the location of polling places, the actions of election officials, the treatment of illiterate voters or similar means," *id.* at 7b; (16) "a black . . . was appointed to the Board of Education when a vacancy occurred in that body," *id.* at 7b; (17) "[s]everal present Commissioners testified that they spent proportionately more time campaigning in the black community," *id.* at 8b; and (18) "[n]or is there any evidence of obstacles to black candidacy with respect to slating of candidates, filing fees, obstacles to qualifying, access [of] voters [to] polling places, or the like," *id.* at 7b.

Rome is administered by a council-manager form of government. *Id.* at 4b. Appellant Bruce Hamler is the Rome City Manager, and Appellant H. F. Hunter, Jr. is Chairman of the Rome City Commission. *Id.* Appellants Hamler and Hunter have participated in this action both in their official and individual capacities. App. at 14. Their individual claims arise from the fact that operation of the Act has prevented municipal elections in Rome for over four years. Juris. State. at 42b.

The United States is a party defendant by virtue of 42 U.S.C.A. § 1973 (1974 & Cum. Supp. 1974 to 1978); App. at 15. The Attorney General of the United States and the Assistant Attorney General of the United States are parties to this action because Appellants' action seeks, in part, to establish that their application of Section 5 to the City of Rome was unconstitutional. App. at 33-36.

II. The Electoral Changes at Issue.

The basic structure of Rome's government was established by a Charter enacted in 1918 by the Georgia General Assembly. Juris. State. at 4b.[3] The Charter provided for a Commission of seven members, one from each of seven wards, elected concurrently, at-large, and by plurality vote. *Id.* The same Charter established a Board of Education, consisting of five members elected concurrently, at-large, and by plurality vote, *id.*; there was no residency requirement for the Board of Education. *Id.* In 1929, two additional wards were annexed to the City, making a total of nine, and seats for these new wards were provided on the City Commission. *Id.*

In 1964, the State of Georgia enacted the Georgia Election Code, which established a majority vote requirement for victory in state and county elections. 1964 Georgia Laws 174 (current version at *Ga. Code Ann.* § 34-1513 (Cum. Supp. 1979)). Although the Code

[3] In Georgia, a city charter is a state law of local application. While cities have some home rule powers, changes in electoral processes can only be made by the Georgia General Assembly. Hence, the electoral provisions of which Rome sought preclearance are laws of the State of Georgia. GA. CODE ANN. § 69-1018 (1976). See Second Supplement to Parties Stipulation of Facts, Exhibits 38, 39, 41.

did not apply to municipalities within the state, the then City Attorney viewed it as a guide to the conduct of city elections and, indeed, he mistakenly believed that the Code required Rome to impose a majority vote provision. Juris. State. at 47b; Deposition of Horace Clary at 54-55 (hereinafter cited as "Clary Deposition"). Such a requirement was thus recommended by him to the City Commission. App. at 246-249.

Differences in growth patterns and rates of growth within the City caused the nine wards, as of 1965, to vary widely in size and population, and these disparities were perceived by the City Attorney to produce both practical and legal difficulties. Clary Deposition at 27-30. One Commissioner responded to 10,000 ward constituents, while others to less than 1,000. *Id.* at 28. The legal difficulties arose from this Court's "one man-one vote" decisions and the consequent belief that the disparity was unconstitutional. *Id.*[4]

Thus, in 1965 the City Attorney also recommended to the City Commission that the wards be redrawn to represent more evenly the population distribution. App.

[4] At the time of the City Attorney's initiation of the voting changes at issue, it will be remembered that the "political thicket" had been entered three years earlier, and voting principles were undergoing significant changes. See Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964); Dusch v. Davis, 387 U.S. 112 (1967). Many jurisdictions were reexamining their electoral systems at the time. *See* Sentell, *Reapportionment and Local Government*, 1 GA. L. REV. 596 (1967). Specifically, Dusch v. Davis, 361 F.2d 495 (4th Cir. 1966) *rev'd*, 387 U.S. 112 (1967) held unconstitutional the at-large election system of Virginia Beach, Virginia, which also imposed a residency requirement in each of its seven boroughs, varying greatly in population. Rome's at-large system, with a residency requirement, was very similar to that of Virginia Beach and would have been subject to the same argument. See Deposition of H. F. Hunter, Jr. at 8.

at 247. A reduction to three wards was proposed. *Id.* The geography of Rome provided a natural division of the City into three parts because three rivers, the Etowah, the Oostanaula, and the Coosa, have their confluence at Rome. *Id.* Each of the three proposed wards would have reasonably approximated the other in population, and, thereby, each voter's ballot would have approximately the same weight in determining the City Commission and Board of Education. *Id.*

The City Attorney was also concerned with the possibility of complete replacement of all Commission members in a single election. Clary Deposition at 45-47. This had occurred in Floyd County government and, in his judgment, had caused serious difficulties. *Id.* at 45. Therefore, he recommended the institution of staggered terms so that only a portion of the Commission seats would be subject to the same election. *Id.* at 47; App. at 248. For similar reasons, a system of designated offices or "numbered posts," was recommended. Clary Deposition at 51-54; App. at 248. This made possible the institution of staggered terms in a multiple ward system by guaranteeing continuity at the ward level. Clary Deposition at 54.[5]

[5] The reason given by the court below for the institution of numbered posts was the City Attorney's mistaken belief that such a system was required by state law. Juris. State. at 47b. The court commented in a footnote that the City Attorney had linked a numbered post provision to the need to facilitate the division of the Commission into committees. *Id.* at 47b. n.87. The court suggested in that same note that a more likely explanation was the need to facilitate majority voting. *Id.* Careful analysis of the Clary Deposition supports the reason offered in the text above. In any event, the court found the change to have an innocent purpose. See App. at 201-204.

Beginning in 1966, Rome's Charter was amended by the Georgia General Assembly to provide a majority vote requirement for Commission and Board of Education general and primary elections and for the conduct and timing of run-off elections; to reduce the number of wards from nine to three; to provide for one Commissioner from each of three numbered posts in each of three wards; to increase the membership of the Board of Education from five to six; to provide for one Board of Education member from each of two numbered posts in each of three wards and to provide that each candidate must be a resident of the ward in which he ran; to stagger the terms of the Commission and Board of Education members; to ease restrictions on voter qualifications as to payment of city taxes; and to transfer voter registration responsibility to Floyd County. Juris. State. at 4b-5b.

In 1968, the Georgia General Assembly enacted the Georgia Municipal Election Code, which applies to all municipal elections in Georgia. *Ga. Code Ann.* § 34A-102 (1970); Juris. State. at 1d. The new Code provided for the use of numbered posts in municipalities which fill more than one identical public office during the same election. *Ga. Code Ann.* § 34A-902 (1970); Juris. State. at 1d. It also established a state-wide majority vote requirement unless otherwise provided for in a city's charter and a procedure for the conduct of run-off elections. *Ga. Code Ann.* § 34A-1407 (Cum. Supp. 1979); Juris. State. at 1d-3d. All of these provisions were submitted to the Attorney General by Georgia, see App. at 98, 100, and were precleared. See App. at 53-56.

III. The Annexations at Issue.

From 1964 through 1973, as a result of its natural growth, Rome effected 60 annexations. Thirteen of these annexations are at issue in this case. Set forth below is the calculation by the court of the persons residing within each of the annexed areas:

Annexed Area	Population by Race				Voting Age Population				No. Registered Voters			
	At Annexation		February 1978		At Annexation		February 1978		At Annexation		February 1978	
	White	Black	White	Black	White	Black	White	Black	White	Black	White	Black
Saddle Mountain	0	0	78	0	0	0	141	0	0	0	134	0
Holmes Acres (E. 11th Ext.)	144	0	263	0	95	0	174	0	31	0	98	0
Lyons Drive West Rome	78	3	315	28	51	1	208	16	8	0	35	6
Georgian—Old Salem Apts.	0	0	295	6	0	0	195	3	0	0	42	1
Battey Hospital	35	0	32	0	21	0	21	0	8	0	11	0
Maplewood Square	0	0	84	0	0	0	55	0	0	0	42	0
Garden Lakes Rollingwood	0	0	172	0	0	0	114	0	0	0	38	0
Berkshire Estates	0	0	112	0	0	0	74	0	0	0	61	0
W.A. DuPre—Rockmart Rd.	0	0	321	8	0	0	222	2	0	0	49	1
Westminster Apts. Harry Butler	0	0	220	10	0	0	138	3	0	0	49	1
Castle Cove Subdivision	0	0	95	0	0	0	63	0	0	0	14	0
Saddle Mt., Sec. 4 Bill DuPre	0	0	84	0	0	0	55	0	0	0	47	0
Old Airport Community	781	0	511	0	515	0	337	0	241	0	203	0
TOTALS	1,038	3	2,582	52	682	1	1,797	24	288	0	823	9

Juris. State. at 52b.

The Appellees have admitted that these annexations were effected without discriminatory purpose. Juris. State. at 49b. The court below noted this admission but nevertheless refused to preclear these annexations because of an asserted reduction in the proportion of black registered voters in Rome.[6] Under the court's findings and its presumption of racial bloc voting, see *id.* at 54b, the annexations have allegedly diminished proportional black voting strength by a factor of .009 (15.6% to 14.7%), or approximately 117 persons.[7] As

---

[6] The annexations occurred separately and without any unified objective over a period of at least eight years, App. at 66, and would have been sustained as having "*de minimis* effect only," see Juris. State. at 53b, if considered separately; however, the court below treated them as cumulative and as having been made currently. *Id.* In view of the finding of the absence of discriminatory purpose, such cumulative treatment is an improper expansion of Section 5. Nevertheless, the court found it "eminently fair in light of . . . the delay . . . [caused by] Rome's initial failure to comply with the Act by submitting them when they occurred." *Id.* However, Appellants note that at least ten of the annexations occurred before the decision in Perkins v. Matthews, 400 U.S. 379 (1971). App. at 66. Even the "single and unified whole" found by the court resulted in only an asserted 0.9% change. The court's holding was, thus, contrary to the observation in City of Petersburg v. United States, 354 F. Supp. 1021 (D.D.C. 1972), *aff'd*, 410 U.S. 962 (1973), as to the impact of the Act upon annexations, which observation was expressly approved in City of Richmond v. United States, 422 U.S. 358, 368-369 (1975).

[7] In finding the "effect" of the annexations to be "significant," the court noted that as of February, 1978, the annexed areas contained 2,528 whites, 832 of whom were registered to vote, and 52 blacks, only 9 of them registered. By comparison, in 1975, the registered voters in the City as a whole totalled 10,982 whites and 2,026 blacks. Thus, the court inferred that presently close to 10% of the white voters, and virtually no black voters, reside in the annexed areas. The court's inference seems to be that dilution resulted from the addition of 823 "new" white and only 9 "new" black voters by virtue of the annexations. There is no evidence to support this inference. A more likely inference from the record

shown below, other findings by the court, however, indicate that during the period of the annexations, 1964 through 1973, the relative proportion of black voters actually increased from 18.45% (1963) to 19.0% (1974):

Year	Totals By Race White	Black	Total Registered Voters
1963	8097	1832 [18.45%]	9929
1964	8313	1864 [18.31%]	10177
1965	11241	2637 [19.00%]	13878
1966	9182	2154 [19.00%]	11336
1967	9532	2236 [19.00%]	11768
1968	10585	2483 [19.00%]	13068
1969	9906	2324 [19.00%]	12230
1970	11081	2599 [18.90%]	13680
1971	9969	2338 [18.90%]	12307
1972	10481	2458 [18.90%]	12939
1973	10080	2365 [19.00%]	12445
1974	10610	2489 [19.00%]	13099

Juris. State. at 66.

is the demographic reality that many voters in the annexed areas moved from other areas of the City and hence were not "new" voters.

Appellants' determination of the court's calculation of dilution is made by adding the 1978 voters within the annexed areas to the 1975 data and then computing the racial proportions. Appellants vigorously dispute the validity of this calculation, for the reasons stated herein, but the resulting "dilution" is, in Appellants' view, nonetheless *de minimis*.

The disparity between these two portions of the court's opinion results from the fact that the ultimate finding of a "significant" impact, *id.* at 54b, of the annexations rested on the differential in black registered voters between 1975 and 1978, when, in fact, all annexations had taken place prior to 1975. App. at 66.

It is also significant that among these 13 annexations, nine of them contained no persons at the time of annexation, Juris. State. at 52b, and the annexation of the "Old Airport Community," the largest, was effected by the Georgia General Assembly over the objection of the Rome City Commission in order to eliminate an unincorporated "island" within the City that had not previously been provided city services. App. at 207.

IV. Elections Held Under the Changes at Issue.

In 1967, Rome conducted an election for members of the Rome Board of Education, in accordance with the 1966 Charter amendments. Juris. State. at 11e; App. at 71. In 1968, Rome conducted an election for the City Commission in accordance with the 1966 and 1967 Charter amendments. Juris. State. at 1e. In 1970, Rome conducted elections for both the Board of Education and the City Commission, in accordance with the 1966, 1967, and 1970 Charter amendments. Juris. State. at 2e, 11e, 23e; App. at 71, 74-79. In 1972, Rome conducted elections for both the Board of Education and the City Commission, in accordance with the 1966, 1967, 1970, and 1971 Charter amendments. *Id.* In 1974, Rome conducted elections for both the Board of Education and City Commission in accordance with the 1966, 1967, 1970, and 1971 Charter amendments. Juris. State. at 2e, 11e, 23e, 25e; App. at 71. This was the last election that has been held in Rome.

V. Administrative and Judicial Proceedings.

In 1969, this Court decided *Allen* v. *State Board of Elections,* 393 U.S. 544, 566-567 (1969), which gave Section 5 the "broadest possible scope," and, thus, determined that changes such as those presently before the Court must be precleared. On January 14, 1971, this Court decided *Perkins* v. *Matthews,* 400 U.S. 379 (1971), which held that annexations by cities covered by the Act constitute "changes" and must be submitted for preclearance. In September, 1971, the Justice Department first adopted regulations implementing Section 5's preclearance provisions. *United States* v. *Board of Commissioners,* 435 U.S. 110, 148 (1978) (STEVENS, J., dissenting) (hereinafter sometimes cited as *Sheffield*).[8] Pursuant to these determinations, the electoral changes and annexations here at issue were submitted to the Attorney General for preclearance in a series of communications and correspondence beginning in 1974, which was substantially completed by August 21, 1975. App. at 107-138; 207-209.

An objection to Rome's submission was entered October 20, 1975, but the Attorney General did not object to the reduction of the number of wards from nine to three or to the provisions for the conduct of run-off elections. *Id.* at 139-143. On May 24, 1976, Rome requested reconsideration. *Id.* at 143-154. The Attorney General withdrew his objection to 47 of the 60 annexations described above. *Id.* at 141. Rome voluntarily supplemented its request for reconsideration on July 14, 1976. *Id.* at 155-159. The Attorney General denied the request for reconsideration on August 12, 1976. *Id.* at 159-162.

[8] Thus, as Mr. Justice Powell has recognized, when the electoral changes and annexations here at issue were enacted "there was no reason to suspect that § 5 preclearance was required." Berry v. Doles, 438 U.S. 190, 197 n.1 (1978) (POWELL, J., concurring). Compare Justice Powell's understanding with that of the court below. Juris. State. at 28b n.65, 53b. See also p. 84 n.75, *infra.*

Appellants filed this action on May 9, 1977,[9] seeking a declaratory judgment, pursuant to Sections 4, 5, and 14 of the Act, that: (1) the prohibitions of Section 5 of the Act are constitutionally limited to purposeful discrimination; (2) Section 5 violates Article IV, Section 4, and the First, Fifth, Ninth, and Tenth Amendments to the Constitution; (3) the Attorney General unconstitutionally applied Section 5 to the City of Rome; (4) the City of Rome is entitled to bailout[10] from the coverage of the Act pursuant to Section 4, because it has not used any test or device during the seventeen years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color; (5) the challenged electoral changes and annexations were precleared by the Attorney General; (6) the challenged electoral changes and annexations did not have the purpose and would not have the effect of denying or abridging the right to vote on account of

[9] Prior to the ruling of the Court in Morris v. Gressette, 432 U.S. 491 (1977), Appellants instituted an action against the Attorney General in the United States District Court for the Northern District of Georgia pursuant to the Mandamus and Venue Act of 1962, 28 U.S.C. § 1362 (1970). That case was dismissed February 24, 1977. City of Rome v. Bell, No. C-76-159-C (N.D. Ga. Feb. 24, 1977).

[10] Appellants will use, throughout this brief, the well-known terms "bailout," to refer to the exemption procedure of Section 4 of the Act, and "preclearance," to refer to the approval procedures of Section 5.

race or color; and (7) Appellants were entitled to an award of attorneys fees. App. at 13-38.

On February 22, 1978, the court below dismissed Count V of Appellants' complaint, which contended that the Attorney General unconstitutionally applied Section 5 of the Act to Rome. Juris. State. at 13a-15a. On April 4, 1979, in an order which was followed on April 9, 1979, by an as yet unreported opinion, the Court denied Appellants' motion for summary judgment, granted that of Appellees on Counts I, II, III, IV, and VI of Appellants' complaint, and dismissed Appellants' case. *Id.* at 1b-2b.[11] No ruling was made on Count VII, the prayer for attorneys fees. *Id.* The court below did approve, without objection from the Appellees, the transfer of voter registration responsibilities from Rome to Floyd County. *Id.*

The refusal of the court below to approve the electoral changes and annexations was grounded upon a prediction that the electoral changes would decrease the probability that a black would be elected to public office in Rome and that the annexations would probably reduce black electoral strength. *Id.* at 49b-51b. The court considered it significant that "there has never been a black elected to political office in the City of Rome," Juris. State. at 8b, and, though acknowledging that a statistical demonstration of racial bloc voting is impossible in this case, *id.* at 10b, held that there is other evidence probative of bloc voting and "presume[d]" that it would continue. *Id.* at 10b-11b, 54b.

[11] Count I of Appellants' complaint charged that Rome was not a jurisdiction subject to Section 5. Appellants concede that this issue was decided adversely to them by this Court in United States v. Board of Commissioners, 435 U.S. 110 (1978).

VI. Summary.

The refusal of the District Court to approve Rome's electoral changes and annexations brings now to this Court the question of what is the impact of the Act and the Constitution upon a political subdivision which is found to be innocent of any discriminatory purpose or, put more generally, is a racial quota of electoral success required by the Act and is such a quota permitted by the Constitution?

SUMMARY OF ARGUMENT

I.

Appellants assert that the electoral changes and annexations at issue must be precleared because such electoral changes and annexations, found to have been enacted without any racially discriminatory purpose, are not prohibited by Section 5 of the Act. A proper construction of Section 5, designed to remain within constitutional limits, indicates that electoral changes and annexations should be found effective when the trier of fact determines that no racially discriminatory purpose motivated their enactment. A judicial determination of innocent purpose is alone sufficient, under the terms of Section 5, to mandate approval. The initial inquiry should be whether or not "purpose" exists. If "purpose" is found not to exist, as in the present case, then the examination must end. If "purpose" is found to exist, then "effect" must be examined to determine whether or not a violation of the Act has occurred. If it is unclear whether or not "purpose" exists, then "effect" should be examined to determine whether it calls for an inference of "purpose."

Appellants further submit that Section 5 does not contemplate the use of "irrebuttable presumptions" of

the existence of "purpose" from a judicial finding of "effect." Appellants maintain that the use of "irrebuttable presumptions" from "effect" have not been sanctioned by this Court when the protection of fundamental rights is in question. Such presumptions are inherently improper and their use by the District Court has effectively inserted a racial quota of political success into the Section 5 standard of "purpose and effect."

The District Court's finding of "effect" as the basis of an "irrebuttable presumption" was premised upon evidence insufficient as a matter of law and was developed from an erroneous determination of the existence of racial bloc voting in Rome. The evidence with respect to the existence of racial bloc voting in Rome is legally insufficient to serve as the basis for the finding of an "effect" proscribed by Section 5 of the Act.

II.

Appellant City of Rome asserts that it should be exempt from the provisions of Section 5, because it established to the satisfaction of the court below that no literacy test or other device has been employed in Rome as a prerequisite to voter registration during at least the past seventeen years. Rome, thus, met the factual test established by the bailout mechanism of Section 4(a) of the Act. Rome argues that municipalities located in States covered by the Act can independently bailout from this coverage. This ability to bailout derives from the language of the Act, especially as construed by this Court in *United States* v. *Board of Commissioners*, 435 U.S. 110 (1978), which established the geographical reach of Sections 4 and 5. The construction of Section 4 advanced by Appellant City of Rome is especially appropriate when a local government has been found innocent of racial discrimination in voting.

III.

If the Appellants' construction of Section 5 is not accepted, and the Act is determined to proscribe electoral changes and annexations enacted without any racially discriminatory purpose, then Congress has acted beyond its delegated powers. For this reason, Section 5 of the Act is unconstitutional.

The opinions of this Court in *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960), and *Wright* v. *Rockefeller*, 376 U.S. 52 (1964), and the recent decisions construing the enforcement provision of the Fourteenth Amendment, *Washington* v. *Davis*, 426 U.S. 229 (1976), *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), *Personnel Administrator* v. *Feeney*, 47 U.S.L.W. 4650 (U.S. June 5, 1975) (No. 78-233), and *Columbus Board of Education* v. *Penick*, 47 U.S.L.W. 4924 (U.S. July 2, 1979) (No. 78-610), indicate that an intentional act is required in order to violate the Fifteenth Amendment. Appellants subscribe to the holding of the United States Court of Appeals for the Fifth Circuit in the consolidated cases of *Nevett* v. *Sides*, 571 F.2d 209 (5th Cir.), *pet. for cert. filed*, 47 U.S.L.W. 3283 (U.S. Oct. 24, 1978) (No. 78-492), *Bolden* v. *City of Mobile*, 571 F.2d 238 (5th Cir.), *prob. juris. noted*, 47 U.S.L.W. 3221 (U.S. Oct. 3, 1978) (No. 77-1844), *Blacks United for Lasting Leadership, Inc.* v. *City of Shreveport*, 571 F.2d 248 (5th Cir. 1978), and *Thomasville Branch of NAACP* v. *Thomas County*, 571 F.2d 257 (5th Cir. 1978), that the Amendment is violated only by intentional acts.

Historical analysis of the Fifteenth Amendment similarly indicates that an intentional act is required in order to violate its terms. Congress did not seek to

create a federal right to vote in proposing the Fifteenth Amendment, and, thus, Congress does not have plenary power to prohibit electoral changes or annexations solely on the basis of disproportionate impact.

Section Two of the Fifteenth Amendment, authorizing Congress to enforce the normative terms of Section One of the Amendment, does not provide congressional power to expand those terms and, thus, reach, through Section 5, electoral changes or annexations that are innocent of purposeful racial discrimination. Historical analysis of Section Two indicates that it granted Congress power only to enforce the normative provisions of Section One. This Court's decisions construing legislation enacted pursuant to Section Two during the Reconstruction Era, during the years from 1957 until 1964, and after the Voting Rights Act of 1965, are consistent with this view. Appellants similarly assert that Congress may not through the creation of irrebuttable presumptions of invidious purpose proscribe actions having only a racially disproportionate impact under the "appropriate legislation" authority of Section Two of the Amendment.

IV.

Section 5 unconstitutionally intrudes upon basic concepts of Federalism and rights guaranteed by the First, Fifth, Ninth, and Tenth Amendments of the Constitution. Appellants assert that these constitutional issues can be examined at this time, because the 1965 Act has been viewed by this Court as temporary, emergency legislation, and conditions now prevalent in the covered jurisdictions no longer justify radical remedies that strain the federal structure in the manner of Section 5.

Section 5 is inconsistent with the basic assumptions of our federal system. The constitutional principles of Federalism embodied in Article IV, Section 4 and the Tenth Amendment are violated by Section 5, because it deprives the covered jurisdictions of their ability to function effectively as members of a federal system.

Section 5 infringes upon the constitutional rights of private citizens by stripping them of their rights of political participation. The Attorney General's actions pursuant to Section 5, in the present case, have resulted in the disenfranchisement of the citizens of Rome for over four years, notwithstanding findings by the court below that the matters to which the Attorney General objects were enacted without any racially discriminatory purpose. Such a disenfranchisement is violative of the First, Fifth, Ninth, and Tenth Amendments of the Constitution.

V.

The electoral changes and annexations presently before this Court have actually been precleared. The Attorney General of the United States precleared the Georgia Municipal Election Code of 1968 insofar as it relates to certain of the electoral changes which Rome has sought to make to its Charter. By virtue of the terms of the 1968 Code and the Attorney General's actions with respect to the Code, certain of Rome's changes have been effectively precleared. Appellants also assert that the electoral changes and annexations at issue have become effective by reason of the fact that the Attorney General failed to respond to a request for reconsideration of his objection to Rome's changes within 60 days of that request and thus failed to respond in accordance with his own regulations.

VI.

Appellants urge that Rome be exempted from the Act or that Section 5 of the Act be declared unconstitutional. If Rome is not exempted from the Act and Section 5 of the Act is not struck down, then Rome, and other jurisdictions, which are free of purposeful discrimination and which have never employed tests or devices that violate the Fifteenth Amendment, will continue to suffer the administrative burden of Section 5 with respect to all future annexations and political changes. In the absence of a holding that Rome is exempt from the Act or that Section 5 is unconstitutional, Appellants request partial relief by a declaration that the present political changes and annexations are effective either by reason of the fact that Section 5 of the Act does not prohibit electoral changes and annexations free of discriminatory purpose or by reason of the fact that the Attorney General has given his approval.

ARGUMENT

Rome put voluminous evidence of its constitutional compliance before the trial court, and it has been found innocent; yet it may not function. For the reasons stated herein, the judgments of the United States District Court for the District of Columbia should be reversed, so that democratic government will be restored to Rome.

I. Electoral Changes and Annexations Enacted Without Discriminatory Purpose Are Not Prohibited By Section 5 of the Act.

The State of Georgia has been designated a covered jurisdiction pursuant to Section 4 of the Act, 30 Fed. Reg. 9897 (1965), and its municipalities are required

to comply with Section 5. *United States* v. *Board of Commissioners,* 435 U.S. 110 (1978). The electoral changes and annexations here at issue are "standards, practices or procedures, with respect to voting" that, to be effective, must be precleared under Section 5 of the Act either by the Attorney General of the United States or by the United States District Court for the District of Columbia. Appellants submit that a proper construction of Section 5 indicates that the present electoral changes and annexations should be found effective because the court below determined that racially discriminatory purpose did not motivate their enactment.

Appellants' proposals regarding the construction of the "purpose" language of Section 5 arise from four important determinations made by the court below, all significantly related to the meaning of "purpose" in the statute: (1) the court concluded that the City carried its burden of showing that the electoral changes were not enacted with a discriminatory purpose, Juris. State. at 45b, and the innocence of the annexations was admitted, Juris. State. at 49b, but the court refused preclearance; (2) the court held that Congress "instructed the courts that the existence of racially disproportionate impact raises an irrebuttable presumption of invidious purpose," Juris. State. at 36b; (3) the court in ultimately finding illegality through use of the irrebuttable presumption found a discriminatory effect in the electoral changes because it concluded black candidates would have been successful under the prior system but had failed under the altered system, Juris. State. at 8b; 47b-48b; (4) the court in finding illegality by irrebuttable presumption from effect accepted the concept of bloc voting and then relied on "strands of evidence"

concerning bloc voting that are insufficient as a matter of law, Juris. State. at 13b.

Appellants submit that the determination of innocent purpose is itself sufficient under the statute to establish the right to implement the changes. In order to remain within constitutional limitations, the threshold question must be: Is there "purpose"? If the answer is found to be no, as in the present case, then examination by the court or the Attorney General must end. If "purpose" is found to exist, then "effect" must be examined to determine whether or not a violation of the Act has occurred. If it is unclear whether or not "purpose" exists, then "effect" should be examined to determine if it calls for an inference of "purpose." Such a construction is consistent with a proper view of the reach of the Fifteenth Amendment and the power of Congress under Section Two of the Amendment. Appellants argue at length below [12] and here submit that: (1) Section One of the Fifteenth Amendment prohibits only intentional discrimination; and (2) alhtough Congress may provide specific remedies for constitutional violations, Congress has no power to expand the normative content of the Fifteenth Amendment to prohibit electoral changes solely on the basis of disproportionate racial impact. A construction such as herein proposed is thus plainly within constitutional limits; only purposeful behavior would be proscribed. The legislative history of Section 5 lends at least physical support to this view. The original version of Section 5 (denominated as Section 8) did not contain the term "purpose" in the establishment of the preclearance

[12] *See* pp. 46-68, *infra*.

standard.[13] The ultimate inclusion of this element suggests its independent significance.

Appellants next assert that a construction of the statute which permits, in the same opinion, a determination of innocence and a presumption of guilt must be corrected.[14] The ultimate determination of illegality through the mechanism of the irrebuttable presumption is contrary to the teachings of this Court. The use of irrebuttable presumptions has been disallowed in a wide variety of areas. In *Heiner* v. *Donnan,* 285 U.S. 312 (1932), the Court struck down an act of Congress which stated that gifts made within two years prior to the donor's death were made in contemplation of death. The Court declared that such a presumption "constitutes an attempt, by legislative fiat, to enact into existence a fact which here does not, and cannot be made to exist in actuality." *Id.* at 329. The Court in *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942), struck down a state statute which permitted the sterilization of certain felons, based upon a presumption that felonious traits were inheritable. In *Stanley* v. *Illinois,* 405 U.S. 645 (1972), the Court invalidated a statutory irrebuttable presumption that unmarried fathers are unfit to raise children. The Court in *Vlandis* v. *Kline,* 412 U.S. 441 (1973), rejected the use of an irrebuttable presumption that denied out-of-state college students the chance

[13] *Hearings on S. 1564 Before the Senate Comm. on the Judiciary,* 89th Cong., 1st Sess. 1-4 (1965); *Hearings on H.R. 6400 Before Subcomm. No. 5 of the House Comm. on the Judiciary,* 89th Cong., 1st Sess. 1, 863-65 (1965).

[14] The result of this construction is that although a jurisdiction may disprove, as Rome has, the existence of any invidious purpose, such proof is to no avail because Congress has supposedly said that where disproportionate impact exists purpose cannot be disproved.

subsequently to prove their in-state residence. In *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974), the Court struck down a local rule presuming irrebuttably that school teachers five-months pregnant were incapable of teaching effectively.[15]

In interpreting Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. 2000e-2000e-17 (1974 & Cum. Supp. 1974 to 1978), a statute analogous to the Voting Rights Act of 1965 in that it also involves the exercise of the remedial power of Congress, this Court has held consistently that employment practices which have a disproportionate racial impact merely raise an inference of discriminatory intent which may be rebutted by an employer. *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978). *See, e.g., Los Angeles Department of Water and Power* v. *Manhart*, 435 U.S. 702 (1978); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). *See generally Duren* v. *Missouri*, 99 S. Ct. 664, 670 n.26 (1979); *Castaneda* v. *Partida*, 430 U.S. 482, 497-98 (1977).

Appellants also suggest that a proper application of the "effect" standard of Section 5 indicates that, even with employment of the irrebuttable presumption, the ultimate determination of illegality was improper. To be objectionable, electoral changes must "have the 'effect' of diluting or abridging the right to vote on account of race within the meaning of Section 5." *Beer*

[15] An irrebuttable presumption dealing with non-fundamental or economic rights may sometimes be upheld. *See, e.g.*, Weinberger v. Salfi, 422 U.S. 749 (1975); and Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976). *But see* Turner v. Utah Dep't of Employment Security, 423 U.S. 44 (1975).

v. *United States*, 425 U.S. 130, 141 (1976). Appellants note, initially, that calculations based on the District Court's own findings indicate that the annexations did not, in fact, dilute black citizens' political power in Rome. See pp. 12 to 15, *supra*. Hence, from these calculations it follows that "purpose" could not be presumed from the "effect" of the annexations simply because there was no prohibited effect.

The dilution principle with respect to constitutional cases was articulated in *White* v. *Regester*, 412 U.S. 755 (1973) as follows:

> To sustain such claims(that the voting strength of racial groups is being cancelled out or minimized), it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

Id. at 765-66 (citations omitted).

Although neither the Voting Rights Act, nor cases interpreting it, establish how a jurisdiction may carry its burden of proof under Section 5, Rome deemed the so-called "*Zimmer* standards" to be appropriate in that context. *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973), *aff'd sub nom. East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976), enumerated the factors which bear on the issue of dilution:

> The Supreme Court has identified a panoply of factors, any number of which may contribute to the

existence of dilution. Clearly, it is not enough to prove a mere disparity between the number of minority residents and the number of minority representatives. Where it is apparent that a minority is afforded the opportunity to participate in the slating of candidates to represent its area, that the representatives slated and elected provide representation responsive to minority's needs, and that the use of a multi-member districting scheme is rooted in a strong state policy divorced from the maintenance of racial discrimination, *Whitcomb* v. *Chavis* . . . would require a holding of no dilution. *Whitcomb* would not be controlling, however, where the state policy favoring multi-member or at-large districting schemes is rooted in racial discrimination. Conversely, where a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made.

Id. at 1305.

Appellants respectfully submit that the findings of the court below regarding the Rome city government's behavior with respect to its black citizens satisfy the *Zimmer* standards.[16]

[16] The findings of the District Court, as numbered in the Statement of the Case, see pages 6-7, *supra*, may be classified under the *Zimmer* "panoply of factors" as follows:

Access to the political processes:
(1), (2), (3), (4), (10), (11), (12), (13), (14), (15), (16), (17), (18)

Surely the conclusions below that Rome's government is "responsive to the needs of the black community" and that the black community had such political power that it could "determine the outcome of many if not most contests" is a determination of the present existence of a "fair allocation of political power between white and nonwhite voters" as recognized in *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 167 (1977) (BRENNAN, J., concurring).[17] These determinations are not indicative of "a retrogression in the position of racial minorities with respect to their effec-

---

Responsiveness of elected officials:
(5), (6), (7), (8), (9), (13), (16), (17)

All eighteen of the findings prove the *absence of past discrimination.*

The *reasons* for the electoral changes are related at pages 8-11, *supra*; the *reasons* for the annexations are related at page 12, *supra*. See App. at 191-192.

[17] Indeed, because "blacks often hold the balance of power in Rome elections," Juris. State. at 55b, it would appear that in Rome black voters have more than "political power." Under the findings of the court below, they would appear to have "voting power," which has been "defined as the ability to cast votes that change election outcomes." L. TRIBE, A TREATISE ON AMERICAN CONSTITUTIONAL LAW 750 (1978) (hereinafter cited as TRIBE). In any event:

> A minority, even in a fair apportionment scheme, would probably lack the power to insure that the policies it favors are adopted by the legislature. It is, after all, a minority. But it would have a *voice* in the formulation of policy, and this voice has value independent of its ability to cast a deciding ballot, first because minority spokesmen might persuade the majority on any given occasion and second, because such spokesmen might alter the long-run character of political thought by the participation in legislative deliberations. Moreover, the situation is vastly oversimplified by assuming that there are cognizable, mutually exclusive, and exhaustive "minorities" and "majorities."

Id. n.2 (emphasis original). *See also Lubin* v. *Panish*, 415 U.S. 709, 716 (1974).

tive exercise of the electoral franchise." *Beer* v. *United States,* 425 U.S. 130, 141 (1976). Thus, these determinations are similarly not indicative of any proscribed "effect" under Section 5.

Nevertheless, in the face of such factual conclusions, the court refused to preclear Rome's changes, apparently because of the conclusion that the changes disadvantaged or discouraged black candidates. See Juris. State. at 8b-9b; 47b-48b.[18] Yet, this Court has held that no minority group has a federal right to elect minority officials "in proportion to its voting potential." *Beer* v. *United States,* 425 U.S. at 136 n.8; *White* v. *Regester* 412 U.S. at 765; *Whitcomb* v. *Chavis,* 403 U.S. at 153. If the decision of the court below receives the imprimatur of this Court, then the concept of political equality for racial and ethnic groups will have been radically redefined. Indeed, the Act will have evolved into a federal guaranty of a right to maximum political effectiveness, or, indeed, a *quota* of political success. The "effect" proscribed by Section 5 will be deemed to

[18] Implicit in the refusal to preclear because of this conclusion is the presumption that white officials represent their race and not the electorate as a whole and cannot represent black citizens; however, this Court has ruled to the contrary in Dallas County v. Reese, 421 U.S. 477 (1975) and Dusch v. Davis, 387 U.S. 112 (1967). *Accord,* Vollin v. Kimbel, 519 F.2d 790, 791 (4th Cir.), *cert. denied,* 423 U.S. 936 (1975).

Under the undisputed record of satisfaction of the *Zimmer* standards in the case *sub judice,* such a presumption is, effectively, irrebuttable. Thus, as we have noted, see p. 27 *infra,* a covered jurisdiction may disprove invidious purpose, as Rome has, but such proof is to no avail because Congress has supposedly said that where disproportionate impact exists purpose *cannot* be disproved; so also, under the ruling below, a covered jurisdiction may meet the *Zimmer* standards and yet be deemed to have enacted changes with discriminatory effect. The burden of proof under Section 5 is thus, in reality, insurmountable, and federal restructuring of local government is inevitable.

be the disproportionate result of political processes, rather than disproportionate access to those processes.

Two members of this Court have very recently observed "whether described as 'benign discrimination' or 'affirmative action,' the racial quota is nonetheless a creator of castes, a two-edged sword that must demean one in order to prefer another." *United Steelworkers* v. *Weber,* 47 U.S.L.W. 4851, 4867 (U.S. June 27, 1979) (Nos. 78-432, 78-435, 78-436) (BURGER, C.J. and REHNQUIST, J., dissenting). Racial quotas are less justifiable in the political context than in any other aspect of society. It has been observed that none of the reasons customarily given for the use of racial and ethnic quotas in education apply to the realm of voting:

> Can quotas be justified as part of an effort to create artificially that mix which would have evolved naturally under more auspicious circumstances? In the schools, perhaps, but not in government. Political offices are not equivalent to seats in a classroom. Groups in our society have never been politically represented in proportion to their size. The Irish have been 'overrepresented,' Jews were long 'underrepresented.' Culture and experience—not simply discrimination—have accounted for such differences. Nor does proportional racial representation in voting have anything in common with admissions to desirable educational programs. There is no barrier set to voting, as there is by selective admissions. And one vote has the same value as any other.

Thernstrom, *The odd evolution of the Voting Rights Act,* THE PUBLIC INTEREST 49, 61-62 (Spring 1979) (hereinafter cited as *Thernstrom*).

A quota of racial political success in Rome would tend strongly to stigmatize black persons, to compart-

mentalize the electorate, to reinforce any arguable bloc voting syndrome, and to prevent minority members from exercising influence on the political system beyond the bounds of their quota.[19] Members of the black community in Rome would not be able to "determine the outcome of many if not most contests," but, instead, would remain forever a minority in their representative influence. In Rome, and similar jurisdictions, there would be "no device more destructive to the notion of equality than the *numerous clausus*—the quota." *United Steelworkers* v. *Weber*, 47 U.S.L.W. at 4867 (BURGER, C.J., and REHNQUIST, J., dissenting).

Finally, Appellants submit that in finding illegality by irrebuttable presumption from effect, the District Court erroneously accepted the concept of bloc voting and relied on insufficient evidence.

Appellants generally object to the District Court's apparent acceptance of the "[t]he notion that Americans vote in firm blocs [which notion] has been repudiated in the election of minority members as mayors and legislators in numerous American cities and districts overwhelmingly white." *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 187 (1977) (BURGER, C.J. dissenting).[20] Rome, and other jurisdictions have de-

[19] While the decision of the court below may have been perceived as an "effort to achieve proportional representation . . . aimed at aiding a group's participation in the political processes," United Jewish Organizations v. Carey, 430 U.S. 144, 172 (1977) (BRENNAN, J., concurring), in reality it may very well frustrate the group's "potentially successful efforts at coalition building across racial lines." *Id* at 172-73.

[20] Indeed, an asserted singular incidence of racial bloc voting has been elevated into *polarized* voting, and the continuance of such voting is presumed. *Compare* Juris. State. at 13b *with* p. 54b.

Courts' repeated emphasis on racial bloc voting tends "to preserve traditional assumptions about groups rather than thoughtful

nied the existence of racial bloc voting and sought to prove its absence. *See Charlton County Board of Education* v. *United States*, 459 F. Supp. 530 (D.D.C. 1978). See App. at 217-232.

The court below noted that a statistical demonstration of the existence *vel non* of racial bloc voting in Rome was impossible. In finding its existence, the court relied upon three "strands of evidence." Juris. State. at 13b. First, while recognizing that the opinion testimony of black witnesses and white witnesses differed regarding the issue of racial bloc voting, the court dismissed the testimony of white witnesses as that of "interested witnesses," Juris. State. at 12b, relying upon an isolated quotation from *City of Richmond* v. *United States*, 422 U.S. 358, 377 (1975), and

---

scrutiny of individuals." Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702, 709 (1978). The entire preoccupation with the concept of racial bloc voting, whether in its hypothesis, proof, remedying, or reinforcement, seems to go wide of the mark in the context of the right sought to be protected. When this Court entered the "political thicket," its decisions focused upon individual voter weight. "The rights allegedly impaired are individual and personal in nature." Reynolds v. Sims, 377 U.S. 533, 561 (1964). See also South v. Peters, 339 U.S. 276, 280 (1950) (DOUGLAS, J., dissenting). Protection of the individual vote appears to have been the goal of the Voting Rights Act when it was enacted. Now the focus has seemingly faded to group power, away from individual rights. Language in *Bakke* suggests that this original understanding should receive renewed attention:

> Both Title VI and Title VII express Congress' belief that, in the long struggle to eliminate social prejudice and the effects of prejudice the principle of *individual* equality, without regard to race or religion, was one on which there could be a "meeting of the minds" among all races and a common national purpose.

Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 416 n.19 (1978) (STEVENS, J., concurring in part and dissenting in part) (emphasis original).

discounting important *dicta* which resulted in remand of those proceedings. *Id.*

Second, the court relied upon the unsuccessful campaign for the Board of Education in 1970 by Reverend Clyde Hill, a black candidate, although the court conceded that "Reverend Hill did receive a sizable number of white votes." Juris. State. at 12b. Reverend Hill received 45% of the votes cast in the run-off election, although the relative proportion of black voters was much lower. Juris. State. at 12b. Appellants contend that the Hill campaign not only does not support a finding of racial bloc voting, but, indeed, negates it.

Third, the court related the testimony of Dr. James W. Loewen, a political sociologist, who testified as an expert witness that racial bloc voting existed in Floyd County (not the City of Rome) during the 1968 Democratic United States Senate Primary between Herman Talmadge and Maynard Jackson. This testimony was expressly relied upon notwithstanding the facts that: (1) the expert was uncertain of the identity of the incumbent in the Talmadge-Jackson election, although he admitted incumbency was an important consideration; (2) Senator Talmadge had served as a Senator for 12 years at the time of the 1968 election, and Mr. Jackson, now the Mayor of Atlanta, was making his first bid for public office; and (3) the testimony concerned an election for national office that occurred 10 years prior to the decision of the court below. Moreover, Dr. Loewen summarized his opinion with the statement, "I cannot state with certainty that Rome, Georgia, in every election since 1968 or from 1978 through 1988 will racially bloc vote." [21] See App. at 228.

[21] There was no evidence that voting along racial lines "regularly happens" in Rome, United Jewish Organizations, 430 U.S. at 166, nor that any group was "fenced out of the political process and their voting strength invidiously minimized," Gaffney v. Cummings, 412 U.S. 735, 754 (1973).

Appellants strenuously objected to the testimony of Dr. Leowen, see App. at 224-228; nevertheless, the court relied upon it to support an inference of racial bloc voting in Rome as of 1978. Juris. State. at 12b-13b.

One commentator has observed that "consistent and persistent racial bloc voting" can disadvantage a political minority but:

> In situations which are politically fluid, disadvantaged voters are not considered disenfranchised. Democrats in a Republican community, for example, are free to join the Republican Party and bore from within. Candidates can choose to emphasize certain issues at the expense of others in an effort to win votes. But in a situation of *true racial bloc voting,* there is no vying for votes across racial lines. Between two candidates of different races, there is no contest at all. Campaigning is unnecessary; a racial count will do. Color becomes the sole determinant of political effectiveness.
>
> Such a situation must be distinguished from one in which black, white, and other citizens belong to political interest groups that cross racial lines.

Thernstrom, supra at 57-58 (emphasis added).

The evidence relied upon by the court below is tenuous at best, and the political situation in Rome hardly approaches the racial cleavage in elections that is deemed to constitute "true racial bloc voting." See Note, United Jewish Organizations v. Carey *and the Need to Recognize Aggregate Voting Rights,* 87 YALE L.J., 571, 599 n.148 (1978). *See generally* App. at 217-228.

In summary, Appellants submit that a proper construction of Section 5 indicates that the electoral changes and annexations before the Court should be found effective because no racially discriminatory purpose motivated their enactment. A judicial determination of innocent purpose is alone sufficient under Section 5 to mandate approval. Furthermore, Appellants submit that the statute does not contemplate the use of an irrebuttable presumption of illegality from effect to contravene a judicial determination of innocent purpose. Also, in reaching illegality by irrebuttable presumption from effect, the District Court erroneously imported a racial quota of success into the meaning of Section 5. Finally, the court below erroneously accepted the concept of bloc voting and relied on insufficient evidence of bloc voting in reaching illegality by irrebuttable presumption from effect.

II. Municipalities Located In States Covered By the Provisions of the Act Can Independently Bailout From the Coverage of the Act.

Section 4 of the Act provides a mechanism for exemption from its prohibitions. This bailout provision has been recognized as an amelioration of the severity of the Section 5 preclearance requirement, *Briscoe* v. *Bell,* 432 U.S. 404 (1978), and, thus, a necessity to the constitutional underpinnings of the Act. *See South Carolina* v. *Katzenbach,* 383 U.S. 301, 331 (1966); Juris. State. at 44b.

The District Court established the factual predicate for bailout by the City of Rome.

> [W]e find that no literacy test or other device has been employed in Rome as a prerequisite to voter registration during the past seventeen years.

Juris. State. at 5b. The court summarized the evidence supporting this finding: "While registrants were technically required to pass the state literacy or character tests, the affidavits of the City officials responsible for voter registration, supported by the unanimous testimony of black deponents, are to the effect that such tests have never been applied discriminatorily and have not been administered at all in recent years." *Id.* at 5b-6b.

The question presented for decision by this Court is whether Rome, having made this factual showing, may bailout, independently of Georgia. Judge McGowan observed that this is apparently a question of first impression and conceded the "abstract force," *id.* at 20b, of Appellants' position. Yet, the court below refused to use "logic as a means of subverting congressional intent," *id.*, and rejected "any logical inference supporting Appellants' position, that might be drawn," *id.* at 23b, from this Court's decision in *Sheffield,* 435 U.S. 110 (1978).

Under Section 4(a), a bailout action may be brought by a "State or subdivision" that is "such" as those to which reference is made earlier in Section 4(a).[22] This reference designates the parties who may properly bring a bailout action.

---

[22] Section 4(a) provides:

> To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, . . . no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the first two sentences of subsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United

When the words to which reference is made are analyzed, it can be seen that proper parties might include either: (1) a subdivision of a State "with respect to which the determinations have been made under the first two sentences of subsection (b) of this section;" or (2) might only include a "political subdivision with respect to which such determinations have been made as a separate unit . . . ."

There are at least five indications that the first construction is the one established by the language of the Act. First, the reference to a "subdivision" as a bailout plaintiff does not indicate that it must be a "political" subdivision of the type as to which separate determinations of coverage may be made. Second, the general reference to a "State or subdivision" could reasonably refer to subdivisions *within* a covered State because the remedial language of 4(a) geographically reaches elections "*in*" a covered State. Third, those "subdivisions" which may be bailout plaintiffs could reasonably include both separately designated "political subdivisions" and "subdivisions" of covered states. Fourth, the definition of those States covered under 4(a) is provided by 4(b),[23] which applies the remedies

States has determined that no such test or device has been used during the seventeen years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color . . . .

42 U.S.C.A. § 1973b(a) (Cum. Supp. 1974 to 1978).

[23] Section 4(b) provides:

[Sentence One] The provisions of subsection (a) of this section shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that

of 4(a) "*in* any State or *in any* political subdivision of a State" (emphasis added) in which certain conditions are found to exist. Again, the language of 4(b) is geographical in reach and, thus, might reasonably include "subdivisions" within covered States.

Strong support for the construction advanced by the Appellants is also provided by a fifth matter, the fact that section 5,[24] the preclearance provision, denomi-

less than 50 per centum of such persons voted in the presidential election of November 1964. [Sentence Two] On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous sentence, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968. [Sentence Three] On and after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous two sentences, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972.

42 U.S.C.A. § 1973b(b) (Cum. Supp. 1974 to 1978).

[24] Section 5 provides:

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first [second or third] sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on

nates a proper preclearance plaintiff as a "State or subdivision" that is "such" as those described in 4(b). It is now clear, by virtue of *Sheffield,* that subdivisions within a covered State must institute preclearance actions, and it has never been suggested that subdivisions within covered States may not institute such actions by reason of the fact that such subdivisions have not been separately designated. Therefore, if a subdivision, such as Rome, located in a covered State must institute preclearance because it is a governmental unit described in Section 4(b), it must be concluded, as a matter of logic, that such a subdivision is a governmental unit that may bailout, because Section 4(b) also determines what governmental units are proper bailout plaintiffs.

This Court's decision in *Sheffield* lends support to Appellants' position. This opinion establishes the interrelationship of Sections 4 and 5 and the geographical reach of each section.

It appears that the *Sheffield* opinion is developed, in part, from the comment of Mr. Justice Harlan, concurring in part and dissenting in part, in *Allen* v. *State Board of Elections,* 393 U.S. 544, 584 (1969), in which he stated that Section 5 "is clearly designed to march in lock step with Section 4—the two sections cannot be understood apart from one another."

November 1, 1964 [1968 or 1972], . . . such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color . . . .

42 U.S.C.A. § 1973c (Cum. Supp. 1974 to 1978).

The Court's exhaustive textual and historical analysis in *Sheffield* did not distinguish the internal aspects of Section 4, the suspension of tests and the bailout remedy. In fact, it was stated in the context of refuting the District Court's position as to the scope of Section 5, that Section 4(a) clearly applies to all political units in covered jurisdictions. 435 U.S. at 127 n.14. Mr. Justice Powell concurred in part in *Sheffield* and observed that Section 5 treats "the governmental units within a designated state or political subdivision as equivalent of the state or political subdivision." *Id.* at 983.

In what appears to be the most direct statement of the Court's position, it was held:

> [I]t is clear that once a State is designated for coverage the Act's remedial provisions apply to acts that are not formally those of the State. Section 4(a) of course applies to all state actors and even the legislative history relied upon by the District Court reveals the congressional understanding that the reference to State in § 5 includes political units within it. This alone would appear sufficient reason to make § 5's preclearance requirement apply to all state action. So in view of the explicit textual relationship between § 4 and § 5, the irrelevance of § 14(c) (2) . . . and the critical role that § 5 is to play in securing the promise of § 4(a), it is wholly logical to interpret "State . . . with respect to which" § 4(a) is in effect as referring to all political units within it.

Id. at 977.

The Court's opinion in *Sheffield* twice refers to the "textual interrelationship between Section 4(a) and Section 5." *Id.* at 126, 128. The opinion dismisses the slight linguistic differences between Sections 4 and 5 and determines that "the actual terms of Section 5

suggest that its coverage is to be coterminous with Section 4(a)'s." *Id.* at 126. Rome submits that the coverage terms of Section 4(a) are coterminous with those of Section 5.

The *Sheffield* opinion does not mention what might be called the "bailout" sentence of Section 4(a) specifically, but the Court's exhaustive treatment of the statutory scheme compels the conclusion that if any such difference in treatment could rightfully be developed, it would have been set forth. This is especially true in light of the fact that the United States made the Court aware of this position in its *Sheffield* brief.[25]

The District Court summarized Appellants' position with respect to bailout:

> The court in *Sheffield* interpreted Section 4(a)'s prohibition of tests and devices "in any State" to import a geographical reach. It then inferred that in light of the close connection between sections 4 and 5, the "State[s]" required to seek judicial or administrative preclearance for voting changes under Section 5 included not only covered States themselves, but also all subsidiary political units within the borders. By like reasoning, it would seem that the "State[s]" entitled to bring Section 4(a) bailout actions should also include political subunits within covered states. Hence, it could be argued, Rome, considered as a "state," should be entitled to its bailout action here.

Juris. State. at 20b. The court acknowledged, in this regard, the "abstract force of this argument," but a contrary intent of Congress was said to be "crystal clear." *Id.* at 20b.

[25] Brief for the United States at 25, United States v. Board of Commissioners, 435 U.S. 110 (1978).

Whatever the clarity of the legislative intent, Appellants submit that given the language of the Act, the opinion of this Court in *Sheffield*, and the constitutional considerations, no other possible interpretation can be given to the availability of the bailout remedy. So long as *Sheffield* is the law, and political subunits within covered states must submit all changes and annexations for preclearance, then such political subunits must be allowed to bailout by virtue of the common reference in the preclearance section and the bailout section to Section 4(b). This Court has made the language of the statute "crystal clear,"[26] and thus the legislative history of the statute must or should be ignored.

[26] The language of Section 4(a), when construed *in pari materia* with Sections 4(b) and 5 and when construed in light of *Sheffield*, is plain. In such a circumstance, it is inappropriate to resort to legislative history. *See* United States v. Rutherford, 47 U.S.L.W. 4724, 4726 (U.S. June 18, 1979) (No. 78-605); Andrus v. Sierra Club, 47 U.S.L.W. 4676, 4678-79 (U.S. June 11, 1979) (No. 78-625); TVA v. Hill, 437 U.S. 153, 184 n. 29 (1978); Ex parte Collett, 337 U.S. 55, 61 (1949); Caminetti v. United States, 242 U.S. 470, 490 (1917); MacKenzie v. Hare, 239 U.S. 299, 307-08 (1915); United States v. First Nat'l Bank, 234 U.S. 245, 259-260 (1914); Bate Refrigerating Co. v. Sulzberger, 157 U.S. 1, 37-42 (1895). The "meaning" of "such State or subdivision" in Section 4(a) is clear by reason of the common understanding of the words used in sections 4(b) and 5 and the interpretation given to the entire Act by the Court in *Sheffield*.

Mr. Justice Frankfurter's view of the use of legislative history supports Appellants' position.

> You may have observed that I have not . . . used the word "intention." All these years I have avoided speaking of the "legislative intent" and I shall continue to be on my guard against using it. The objection to "intention" was indicated in a letter by Mr. Justice Holmes which the recipient kindly put at my disposal:
>
> "Only a day or two ago—when counsel talked of the intention of a legislature, I was indiscreet enough to say I don't care what their intention was. I only want to know what the words mean. Of course the phrase often is used to

III. Congress Is Not Empowered Under Section Two of the Fifteenth Amendment of the Constitution to Prohibit Electoral Changes and Annexations Found to be Enacted Without Discriminatory Purpose.

Rome argued to the District Court that Section 5 of the Act is unconstitutional to the extent that Congress has sought to prohibit electoral changes and annexations found to be enacted without discriminatory purpose. The court, however, concluded that "Congress can be said to have instructed the courts that the existence of racially disproportionate impact raises an irrebuttable presumption of invidious purpose."[27] Juris. State. at 36b. Presumably, this conclusion is premised

---

express a conviction not exactly thought out—that you construe a particular clause or expression by considering the whole instrument and any dominant purposes that it may express. In fact intention is a residuary clause intended to gather up whatever other aids there may be to interpretation beside the particular words and the dictionary."

If that is what the term means, it is better to use a less beclouding characterization. Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government . . . .

Frankfurter, *Some Reflections on the Reading of Statutes,* 47 COLUM. L. REV. 527, 538 (1947). *See* Radin, *Statutory Interpretation,* 43 HARV. L. REV. 863, 870-872 (1930). *See generally* H. HART & A. SACKS, THE LEGAL PROCESS 1147-48, 1220 (Tent. ed. 1958).

[27] Although Judge McGowan noted that "[i]n light of this disposition, we need not inquire whether, still assuming that the Fifteenth Amendment of its own force reaches purpose only, Congress has the power under Katzenbach v. Morgan, 384 U.S. 641 (1966), to extend the substantive content of the Fifteenth Amendment protections so as to proscribe voting discrimination in effect as well as purpose," Juris. State. at 37b n.74, the inescapable effect of the Court's decision is to acknowledge such a power in Congress. Judge McGowan also noted that "Rome's argument is . . . squarely presented for decision on the facts of this case." *Id.* at 32b n.69.

upon either of two constitutional theories: (1) Section One of the Amendment prohibits electoral changes found to be free of discriminatory purpose but which may have a racially disproportionate impact; or (2) the creation of an irrebuttable presumption of invidious purpose from the existence of racially disproportionate impact is "appropriate legislation" to remedy intentional discrimination pursuant to Section Two of the Amendment. Appellants submit that both of these theories are erroneous.

A. Section One of the Fifteenth Amendment does not confer a federally created right to vote but prohibits intentional discrimination.

This Court has indicated that "purpose" is a *sine qua non* of a Fifteenth Amendment violation. In *Gomillion* v. *Lightfoot,* 364 U.S. 339, 346 (1960), Mr. Justice Frankfurter noted for the Court: "When a legislature thus *singles out* a readily isolated segment of a racial minority for *special discriminatory treatment,* it violates the Fifteenth Amendment." (emphasis added) *See City of Richmond* v. *United States,* 422 U.S. 358, 378 (1975). In *Wright* v. *Rockefeller,* 376 U.S. 52 (1964), the Court upheld a New York congressional apportionment statute, under the Fourteenth and Fifteenth Amendments, because the complaining parties failed to prove that the legislature was *motivated* by racial considerations or that it, in fact, drew the congressional apportionment along racial lines. Mr. Justice Black, writing for the Court, noted that the District Court's findings that "the challenged part of the New York Act was [not] the product of a state *contrivance to segregate* on the basis of race or place of origin . . . was crucial to appellants' case as they presented it, and for that reason their challenge [could not] be

sustained." *Id.* at 58 (emphasis added). The italicized language of these opinions indicates that this Court has found intent to be an element of a Fifteenth Amendment violation.

This Court has directly held that intent is required to prove Fourteenth Amendment violations. In *Washington* v. *Davis*, 426 U.S. 229 (1976), a job-related employment test that resulted in a racially disproportionate impact was upheld because there had been no showing that racial discrimination entered into the establishment or formulation of the test. The Court stated that "we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another." *Id.* at 242. Similarly, in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), the Court upheld a zoning board decision that tended to perpetuate racially segregated housing patterns since, apart from its effect, the board's decision was shown to be nothing more than an application of constitutionally neutral zoning policies. "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Id.* at 265.

This Court recently reaffirmed these decisions. In *Personnel Administrator* v. *Feeney*, 47 U.S.L.W. 4650 (U.S. June 5, 1979) (No. 78-233), the Court found no equal protection violation in a Massachusetts statute which granted an absolute lifetime preference to veterans, even though the statute had a disproportionate impact upon females. The Court held that " 'discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences . . . . It implies that the decisionmaker, . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 4656. Finally, in *Columbus Board of Education* v. *Penick*, 47 U.S.L.W. 4924 (U.S. July 2, 1979) (No. 78-610), this Court reviewed a decision which enjoined the Columbus, Ohio, Board of Education from continuing to discriminate on the basis of race in operating public schools and ordered the submission of a system-wide desegregation plan. The Court held that "to prevail the plaintiffs were required to 'prove not only that segregated schooling exists but also that it was brought about or maintained by *intentional* state action,' . . . that is, that the school officials had '*intended to segregate.*' " *Id.* at 4927-28 (citations omitted and emphasis added). The lower court decisions in *Penick* were approved because they "recognized that under those cases [*Washington* v. *Davis* and *Arlington Heights*] disparate impact and foreseeable consequences, without more, do not establish a constitutional violation." *Id.* at 4928.

The United States Court of Appeals for the Fifth Circuit, in a comprehensive opinion, encompassing four separate cases, including *Bolden* v. *City of Mobile*, 571 F.2d 238 (5th Cir.), *prob. juris. noted*, 47 U.S.L.W. 3221 (U.S. Oct. 3, 1978) (No. 77-1844), *Blacks United for Lasting Leadership, Inc.* v. *City of Shreveport*, 571 F.2d 248 (5th Cir. 1978), *Thomasville Branch of NAACP* v. *Thomas County*, 571 F.2d 257 (5th Cir. 1978), and most significantly *Nevett* v. *Sides*, 571 F.2d 209 (5th Cir.), *pet. for cert. filed*, 47 U.S.L.W. 3283 (U.S. Oct. 24, 1978) (No. 78-492), recently held that "[a] showing of improper motivation or purpose is necessary to establish a valid cause of action under the fifteenth amendment." *Id.* at 221. *Nevett* was an action

brought by black residents of Fairfield, Alabama, who alleged that an at-large system of selecting the city council president and city councilmen diluted black voting strength. The Fifth Circuit found that "intentional discrimination" must be alleged in a dilution case under both the Fourteenth and the Fifteenth Amendments. *Id.* at 215. Observing that the Fifteenth Amendment has been "invoked successfully only in cases founded on acts of intentional racial discrimination," *id.* at 220, the *Nevett* court determined that this Court's decisions in *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960), and *Wright* v. *Rockefeller,* 376 U.S. 52 (1964), require a showing of intentional discrimination in racially based voting dilution claims founded on the Fifteenth Amendment. *Id.* at 220-221.

The history of the Fifteenth Amendment also reveals that Congress sought to prohibit intentional denials of the franchise. Senator Hamilton of Maryland stated in a debate regarding the Enforcement Act of 1870 [28] that:

> Under the fifteenth amendment there must be two intents, or one act with an intent: First, when you come to indict a person under this amendment for violating its provisions you must allege that he refused to register, if that was a prerequisite before he could vote, or that he refused the party his right to vote; and secondly, you must allege that he did so refuse *because of* the party's color, or of his race, or his previous condition of servitude . . . . Under the Fifteenth Amendment the only case that can come within the jurisdiction of the United States is when the right to vote is refused to a man *by reason of* his color, *by reason of* his race, or *by reason of* his previous condition of servitude.

[28] Act of May 31, 1870, ch. 114, 16 Stat. 140 (1870), *as amended by* Act of Feb. 28, 1871, ch. 99, 16 Stat. 433 (1871) (current versions at 42 U.S.C. §§ 1981, 1983 (1970).

> Gentlemen may say that it would be extremely difficult *to prove such an intent* in cases of this kind. This may be so, but yet *you must prove it* to the satisfaction of the court and jury . . . .

CONG. GLOBE, 41st Cong., 2d Sess., 357 (1870) (emphasis added).

Congress rejected a proposal that would give it unlimited discretion to abolish state electoral provisions:

> Congress shall have the power to abolish or modify any restrictions upon the right to vote or hold office prescribed by the constitution or laws of any State.

SENATE JOURNAL, 40th Cong., 3d Sess. 226 (1869). Congress therefore appears to have perceived limitations on its power to abolish state electoral provisions. Rome submits that the limit is intentional discrimination.[29]

[29] Certain members of Congress initially favored a proposal that would add additional grounds of prohibition which, while racially neutral on their face, would have a disproportionate impact upon non-whites, because they thought that such disproportionate impacts would otherwise be constitutional: "No discrimination shall be made in any state among the citizens of the United States in the exercise of the elective franchise on account of race, color, nativity, property, education, or creed." SENATE JOURNAL, 40th Cong., 3d Sess. 227 (1869). This proposal was rejected, but the legislators did include the phrase "previous condition of servitude" in the Fifteenth Amendment, because they thought that, absent such a reference, States would be free to disenfranchise persons on that basis even though such a provision would have a disproportionate racial impact. CONG. GLOBE, 40th Cong., 3d Sess. 1225 (1869). Indeed, it was generally believed that if a state passed disenfranchising legislation not based on any of the three specified grounds, it would be valid under the Fifteenth Amendment regardless of its disproportionate impact. *Id.* at 722, 862, 900, 1307, App. 98 (Remarks of Senators Warner of Alabama and Fowler of Tennessee, and Representatives Bingham and Shellabarger of Ohio and Williams of Oregon). Even those who believed

Appellants also argue that in rejecting several proposals which would have conferred a federally created right to vote and a corresponding plenary enforcement power, Congress demonstrated that intent is required for a violation of the Fifteenth Amendment. There is

> [a] difference between legislation by Congress to execute an express power exclusive in itself, and legislation to enforce a limitation of a general power exclusive in the state. In the former case, Congress may claim a liberal construction in aid of its express exclusive power. In the latter case, the state has a right to restrict Congress to the *very terms of the prohibition.* This is especially true when the prohibition affects the power of the state over a subject such as suffrage.

CONG. GLOBE, 41st Cong., 2d Sess., App. 473 (1870) (Remarks of Senator Casserly of California) (emphasis added). The fact of the defeat of the following proposal is consistent with this view:

> All the male citizens of the United States, residents of the several States now or hereafter comprehended in the Union, of the age of twenty-one years and upward, *shall be entitled to an equal vote in all elections in the state wherein they reside,* the period of such residence as a qualification for voting to be decided by each State, except such citizens as shall engage in rebellion or insurrection or shall be duly convicted of treason or other infamous crime.

---

that the amendment was not limited to the specified grounds of prohibition believed that it reached "anything growing out of that person's condition of servitude . . . ." *Id.* at 1317 (Remarks of Senator Stewart of Nevada).

SENATE JOURNAL, 40th Cong., 3d Sess. 226 (1869) (emphasis added). Similarly, Congress rejected the following federal enfranchisement proposal:

> Citizens of the United States of African descent shall have the same right to vote and hold office as other citizens.

CONG. GLOBE, 40th Cong., 3d Sess. 1032 (1869). In rejecting these proposals, which would have conferred a federally created right to vote, Congress precluded itself from exercising plenary power to protect the franchise and limited itself to providing remedies for intentional denials of the right to vote.[30]

The opinions of this Court and the history of the Amendment demonstrate that intent is an element of a Fifteenth Amendment violation. Moreover, since Congress did not propose a federally created right to vote in the Fifteenth Amendment, Congress does not have plenary power to prohibit electoral changes or annexations solely on the basis of disproportionate impact.

B. Congress has no power to expand the normative content of Section One of the Fifteenth Amendment to prohibit electoral changes or annexations solely on the basis of disproportionate racial impact.

Section Two of the Fifteenth Amendment provides that "Congress shall have power to enforce this article

---

[30] The conclusion that there is no congressional power affirmatively to enforce the franchise, regardless of the purpose of the electoral provision, is also supported by the fact that no minority group has a federal right to elect minority officials in proportion to its voting potential. United Jewish Organizations v. Carey, 430 U.S. 144, 166 (1977); Beer v. United States, 425 U.S. 130, 136 n.8 (1976); White v. Regester, 412 U.S. 755, 765-66 (1973); and Whitcomb v. Chavis, 403 U.S. 124, 153 (1971).

by appropriate legislation." The history of the Amendment and the decisions of this Court demonstrate that Section Two does not empower Congress to expand the normative content of Section One and thereby prohibit electoral changes solely on the basis of disproportionate racial impact.

During the debates on Section Two of the Amendment, certain members of Congress asserted that the provision conferred upon Congress no power of affirmative legislation. CONG. GLOBE, 41st Cong., 2d Sess., App. 353 (1870) (Remarks of Senator Hamilton of Maryland). Others thought that the enforcement provision would consist in merely declaring what acts should be considered void for conflict with Section One and in providing judicial machinery by which cases involving the Amendment might be instituted in the federal courts. *Id.* at 3663 (Remarks of Senator Thurman of Ohio); *id.*, App. 472 (Remarks of Senator Casserly of California); *id.*, 42d Cong., 1st Sess. 648 (1871) (Remarks of Senator Davis of Kentucky). Some congressmen asserted that Congress could not exercise its power under Section Two until the Amendment was violated. *Id.*, 41st Cong., 3d Sess. 1635 (1871) (Remarks of Senator Vickers of Maryland). Notwithstanding these varying interpretations of the provision, the prevailing view was that Section Two gave Congress no more power than it would have without the provision, either because it was a mere repetition of the power granted in the "sweeping clause" of the Constitution, *id.*, 41st Cong., 2d Sess. 3663 (Remarks of Senator Thurman of Ohio), or because the general government is necessarily invested with power to correct infractions of the substantive provisions of the Constitution, *id.*, 41st Cong., 3d Sess. 1636 (Remarks of

Senator Vickers of Maryland). Senator Casserly of California stated "[i]n short, a power in Congress to legislate in execution of constitutional provisions never can be held to enlarge those provisions." *Id.*, 41st Cong., 2d Sess., App. 472.

Congress has enacted legislation pursuant to Section Two of the Amendment during three time periods: The Reconstruction Era,[31] from 1957 to 1964,[32] and in 1965 when it enacted the Act. The power of Congress has been examined at each juncture, and this Court has held consistently that Congress may not expand the normative content of the Fifteenth Amendment. This Court's early opinions reveal two central factors which compel the conclusion that Congress exceeded its powers in enacting Section Five of the Act to the extent that it sought to proscribe actions having only a disproportionate impact: (1) congressional power under Section Two of the Fifteenth Amendment is merely remedial because the Fifteenth Amendment prohibits discrimination and does not create a right to vote; and (2) this remedial power of Congress is triggered only if Section One of the Fifteenth Amendment is violated.

---

[31] Civil Rights Act of 1875, Act of March 1, 1875, ch. 114, §§ 3-5, 18 Stat. 336, 337 (1875) (current version of § 5 at 42 U.S.C. § 1984 (1970)); Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (1871); Enforcement Act of 1870, Act of May 31, 1870, ch. 114, 16 Stat. 140 (1870), *as amended by* Act of Feb. 28, 1871, ch. 99, 16 Stat. 433 (1871) (current versions at 42 U.S.C. §§ 1981, 1983 (1970)). Most of the provisions which were not struck down by the Court were repealed in 1894. Act of Feb. 8, 1894, 28 Stat. 36 (1894).

[32] Civil Rights Act of 1964, Pub. L. No. 8-352, 78 Stat. 241 (codified in scattered sections of 28, 42 U.S.C. (1970)); Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (codified in scattered sections of 18, 20, 42 U.S.C. (1970)); Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (codified in scattered sections of 5, 28, 42 U.S.C. 1970)).

The recent decisions of this Court in *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966), and *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), have raised serious questions [33] as to this Court's current position with regard to the power of Congress to expand the normative scope of the Fourteenth Amendment, and the implication of a correlative power under the Fifteenth Amendment. Rome submits that this apparent conflict can be satisfactorily resolved by a careful analysis of those opinions in light of the history of the Fifteenth Amendment and this Court's traditional interpretation of the power of Congress. Rome contends that this Court has not held that Congress may expand the substantive content of the rights toward which such remedies are directed.

(i) *The Reconstruction Era Cases*

The cases construing the Reconstruction Era legislation hold that the scope of delegated congressional power depends upon the structure of the constitutional provision upon which that power is based:

> Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are *secured by way of prohibition* . . . . The truth is, that the implication of a power to legislate in this manner [Civil Rights Act of 1875] is based upon the assumption that if the States are forbidden to

[33] *See, e.g.*, Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81; Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975); Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199 (1971); Monaghan, *Foreword, Constitutional Common Law*, 89 HARV. L. REV. 1 (1975); and Beer v. United States, 425 U.S. 130, 148 n.4 (1976) (BRENNAN and MARSHALL, J.J., dissenting).

> legislate or act in a particular way on a particular subject, and power is conferred upon Congress to enforce the prohibition, this gives Congress power to legislate generally upon that subject, and not merely power to provide modes of redress against such State legislation or action. The assumption is certainly unsound. *It is repugnant to the Tenth Amendment of the Constitution* . . . .

The Civil Rights Cases, 109 U.S. 3, 11-15 (1883) (emphasis added).

"The whole scope and effect of this series of decisions is that . . . certain fundamental rights, recognized and declared, but not granted or created, in some of the Amendments to the Constitution, are thereby guaranteed only against a violation or abridgement by the United States or by the States, as the case may be, and *cannot therefore be affirmatively enforced by Congress* . . . ." *Logan* v. *United States*, 144 U.S. 263, 293 (1892) (emphasis added). Where the Court has found federally created rights, it has found plenary congressional power to enforce those rights. *See, e.g., Ex parte Yarbrough*, 110 U.S. 651 (1884) (power of Congress to protect a citizen from violence while voting in a federal election); *Logan* v. *United States*, 144 U.S. 263 (1892) (power of Congress to protect a federal prisoner from violence while under custody of a federal officer). On the other hand, where Congress acts pursuant to a prohibitory Amendment, its powers are limited. The Fifteenth Amendment "does not confer the right of suffrage on anyone. It merely invests citizens of the United States with the constitutional right of exemption from discrimination in the enjoyment of the elective franchise on account of race, color, or previous

condition of servitude . . . ." *United States* v. *Harris,* 106 U.S. 629, 637 (1883). "It is only when the wrongful refusal at such an election is *because* of race, color, or previous condition of servitude, that Congress can interfere, and provide for its punishment." *United States* v. *Reese,* 92 U.S. 214, 218 (1875) (emphasis added).[34]

In overturning portions of the Enforcement Act of 1870,[35] the Court held that: "[W]e find . . . no words of limitation, or reference even, that can be construed as manifesting any intention to *confine its provisions to the terms of the Fifteenth Amendment,*" and therefore that "Congress has not yet provided by 'appropriate legislation' for the punishment of the offense charged in the indictment . . . ." *Id.* at 220-21 (emphasis added). Similarly, in *James* v. *Bowman,* 190 U.S. 127 (1903), this Court struck down a statute[36] which did not require an allegation of intent:

> True, the parties who were bribed were alleged to be "men of African descent," . . . and again that they were "persons to whom the right of suffrage and the right to vote was then and there guaranteed by the Fifteenth Amendment." . . . *But this merely describes the parties wronged as within the classes named in the amendment* . . . . [*A*]*n indictment which charges no discrimination on account or race, color, or previous condition of servitude is . . . destitute of support by such amendment.*

Id. at 139. (emphasis added). These Reconstruction Era cases show that Congress may not affirmatively enforce the franchise, but Congress may only provide remedies for intentional discrimination.

(ii) *The Remedial Legislation from 1957 to 1964*

In the late 1950's and early 1960's, Congress enacted several statutes[37] designed to facilitate case-by-case litigation against voting discrimination. This remedial legislation was unanimously upheld,[38] and this Court maintained its earlier position that the power of Congress is triggered only by a substantive constitutional violation. For example, in *Louisiana* v. *United States,* 380 U.S. 145 (1965), the United States brought an action pursuant to 42 U.S.C. § 1971 to enjoin the enforcement of a Louisiana "interpretation" provision. The Court found that the provision violated the Fifteenth and Fourteenth Amendments as well as the congressional statute and specifically held that "[t]here can be no doubt from the evidence in this case that the District Court was amply justified in finding that Louisiana's interpretation test, as written and as applied,

[34] The language of this Court in 1875 with respect to the Enforcement Act is strikingly similar to this Court's recent pronouncement in Personnel Adm'r v. Feeney, 47 U.S.L.W. 4650, 4656 (U.S. June 5, 1979) (No. 78-233), that discriminatory purpose "implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."

[35] Act of May 31, 1870, ch. 114, §§ 3-4, 16 Stat. 140 (1870).

[36] Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (1871).

[37] *See* note 32, *supra.*

[38] *See, e.g.,* United States v. Mississippi, 380 U.S. 128 (1965); Hannah v. Larche, 363 U.S. 420 (1960); United States v. Raines, 362 U.S. 17 (1960); Alabama v. United States, 304 F.2d 583 (5th Cir.) *aff'd per curiam,* 371 U.S. 37 (1962); United States v. McElveen, 180 F.Supp. 10 (E.D. La.) *aff'd per curiam sub nom.* United States v. Thomas, 362 U.S. 58 (1960).

was part of a *successful plan to deprive* Louisiana Negroes of their right to vote." *Id.* at 151 (emphasis added).

(iii) *Cases Construing the Voting Rights Act of 1965*

By 1965, Congress found that case-by-case litigation was inadequate and enacted the Act because "some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration." *South Carolina* v. *Katzenbach,* 383 U.S. 301, 314 (1966). Although this Court generally upheld the constitutionality of the Act in *South Carolina* v. *Katzenbach,* a careful examination of the opinion reveals two significant facts. First, the discussion of the power of Congress was limited to the argument set forth by the State of South Carolina "[t]hat Congress may appropriately do no more than to forbid violations of the Fifteenth Amendment in general terms—that the task of fashioning specific remedies or of applying them to the particular localities must necessarily be left entirely to the courts." *Id.* at 327. Rome does not argue that Congress has no power to fashion specific remedies; it asserts that those remedies must be tailored to rights contained in Section One of the Fifteenth Amendment.

Second, it is clear that this Court, in upholding the constitutionality of the Voting Rights Act, assumed that it was dealing with provisions which violated Section One of the Fifteenth Amendment. For example, the Court stated that "[t]he record shows that in most

of the States covered by the Act, . . . various tests and devices have been instituted *with the purpose* of disenfranchising Negroes, have been framed in such a way as to facilitate this aim, and have been administered in a discriminatory fashion for many years." *Id.* at 333-34. Specifically, with respect to Section 5, the Court stated that "[t]he Act suspends new voting regulations pending scrutiny by federal authorities to determine whether their use *would violate the Fifteenth Amendment.*" *Id.* at 334 (emphasis added).

Although this Court has often cited *South Carolina* v. *Katzenbach* with approval since 1966, see note 57, *infra,* the issue of whether Congress may prohibit electoral changes solely on the basis of disproportionate impact was not raised, and indeed members of this Court stated directly that "§ 5 is *undoubtedly tied to the standards of the Constitution.*" *Beer* v. *United States,* 425 U.S. 130, 148 (1976) (BRENNAN and MARSHALL, J.J., dissenting) (emphasis added).

In *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966), this Court upheld the constitutionality of Section 4(e) of the Act which prohibited an English literacy requirement for persons who had been educated in certain non-English speaking schools. The first rationale for the decision was that Congress found that the state had intentionally discriminated against Spanish-speaking citizens in the furnishing of governmental services, and that the prohibition of a discriminatory literacy test was an appropriate remedy for that constitutional violation. *Id.* at 652-53. This Court, therefore, held that the prohibition of the literacy test was appropriate legislation to enforce the right to governmental

services, a clearly recognized object of the Fourteenth Amendment.[39]

The second rationale rested upon deference to congressional findings that the use of an English literacy test was an intentional denial of voting rights and, thus, a denial of equal protection. The Court had previously interpreted the Fourteenth Amendment to cover the right to vote. *See, e.g., Harper* v. *Virginia Board of Elections,* 383 U.S. 663 (1966); *Louisiana* v. *United States,* 380 U.S. 145 (1965); *Carrington* v. *Rash,* 380 U.S. 89 (1965); *Nixon* v. *Condon,* 286 U.S. 73 (1932); and *Nixon* v. *Herndon,* 273 U.S. 536 (1927). The Court, therefore, did not hold that Congress could expand the substantive content of the Fourteenth Amendment to cover voting rights but deferred to a congressional finding that the English literacy requirement did in fact deny equal protection in light of the earlier holdings of the Court.[40] It was held that:

---

[39] Prior decisions of the Court had held that the equal protection clause encompasses equal access to governmental services. *See, e.g.,* Turner v. City of Memphis, 369 U.S. 350 (1962); Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[40] As stated by Justice Harlan:

> "It is suggested that the proper basis for the doctrine enunciated in *Morgan* lies in the relative factfinding competence of Court, Congress, and state legislatures . . . . In this view, as I understand it, since Congress is at least as well qualified as a state legislature to determine factual issues, and far better qualified than this Court, where a dispute is basically factual in nature the congressional finding of fact should control, subject only to review by this Court for reasonableness.
>
> In the first place, *this argument has little or no force as applied to the issue [of] whether the Fourteenth Amendment covers voter qualifications.* Indeed I do not understand the adherents of *Morgan* to maintain the contrary."

Oregon v. Mitchell, 411 U.S. 112, 205-06 (1970) (HARLAN, J., concurring in part and dissenting in part) (emphasis added).

> Congress might well have questioned, in light of the many exemptions provided, and some evidence suggesting that prejudice played a prominent role in the enactment of the requirement, whether these [legitimate reasons] were actually the interests being served . . . . Since Congress undertook to legislate so as to preclude the enforcement of state law, and did so in the context of a general appraisal of literacy requirements for voting, . . . to which it brought especially informed legislative competence, it was Congress' prerogative to weigh these competing considerations.

Katzenbach v. *Morgan* at 654-56.

This Court also dealt with the power of Congress to expand the substantive scope of the Fourteenth Amendment in *Oregon* v. *Mitchell,* 400 U.S. 112 (1970), which upheld a provision enfranchising 18-year old voters in its application to federal elections, but not state elections, upheld a ban on literacy tests in both state and federal elections, and upheld a ban on residency requirements in presidential and vice-presidential elections. Four Justices voted to sustain the 18-year old vote provision in its entirety; four other Justices voted to invalidate the provision in its entirety. Only Justice Black drew a distinction between federal and state elections, and he, therefore, announced the judgments of the Court in an opinion expressing his own view of the case. An analysis of the five opinions written in the case reveals that the votes were based on several grounds, all of which are consistent with the traditional interpretation of the power of Congress.

Numerous affirmative votes recognized the traditional plenary power of Congress to enforce federally created rights: Justice Black recognized congressional

power to regulate federal elections;[41] Justice Douglas recognized power to enforce the privileges and immunities provided by Article IV, Section 2 of the Constitution;[42] Justices Brennan, White and Marshall recognized congressional power to enforce the right to interstate travel and settlement;[43] and Justices Burger, Stewart and Blackmun recognized congressional power to enforce the right to travel from state to state.[44] Justice Harlan voted to strike down the 18-year old vote provision and the residency requirement because of the absence of such federally created rights.[45] Justice Black voted to strike down the 18-year old vote provision with respect to state elections based upon the failure of Congress to find facts to support a violation of the Fourteenth Amendment.[46] Many affirmative judgments were based upon deference to a congressional finding of fact that a provision did violate the Fourteenth or Fifteenth Amendments: Justices Douglas[47] and Brennan, White, and Marshall[48]

[41] 400 U.S. at 119-24, 134 (BLACK, J., announcing the judgments of the Court).

[42] *Id.* at 148 & n.12 (DOUGLAS, J., concurring in part and dissenting in part).

[43] Id. at 237 (BRENNAN, WHITE, and MARSHALL, J.J., concurring in part and dissenting in part).

[44] *Id.* at 285-86 (BURGER, C.J. and STEWART and BLACKMUN, J.J., concurring in part and dissenting in part).

[45] *Id.* at 209-12 (HARLAN, J., concurring in part and dissenting in part).

[46] *Id.* at 129-30 (BLACK, J., announcing the judgments of the Court).

[47] *Id.* at 141 (DOUGLAS, J., concurring in part and dissenting in part).

[48] *Id.* at 240 (BRENNAN, WHITE, and MARSHALL, J.J., concurring in part and dissenting in part).

deferred to such a finding with respect to the 18-year old vote provision; Justices Black,[49] Douglas,[50] Brennan, White, and Marshall[51] and Burger, Stewart and Blackmun[52] did so with respect to literacy tests; Justices Douglas,[53] Burger, Stewart and Blackmun[54] gave such deference with respect to residency requirements. Justice Harlan voted to strike down the 18-year old vote provision and the residency requirements based upon a finding that the Fourteenth Amendment does not cover voting rights.[55] Finally, Justices Burger, Stewart and Blackmun concluded with respect to the 18-year old vote provision:

> [Section] 302 is valid only if Congress has the power not only to provide the means of eradicating situations that amount to a violation of the Equal Protection Clause, but also to determine as a matter of *substantive* constitutional law what situations fall within the ambit of the clause, and what state interests are "compelling". . . . [T]o sustain the constitutionality of § 302 would require an enormous extension of that decision's [Katz-

[49] *Id.* at 132-33 (BLACK, J., announcing the judgments of the Court).

[50] *Id.* at 147 (DOUGLAS, J., concurring in part and dissenting in part).

[51] *Id.* at 235 (BRENNAN, WHITE, and MARSHALL, J.J., concurring in part and dissenting in part).

[52] *Id.* at 283 (BURGER, C.J. and STEWART and BLACKMUN, J.J., concurring in part and dissenting in part).

[53] *Id.* at 148 (DOUGLAS, J., concurring in part and dissenting in part).

[54] *Id.* at 285-86 (BURGER, C.J. and STEWART and BLACKMUN, J.J., concurring in part and dissenting in part).

[55] *Id.* at 206-13 (HARLAN, J., concurring in part and dissenting in part).

> enbach v. Morgan's] rationale. I cannot but conclude that § 302 was beyond the constitutional power of Congress to enact.

400 U.S. at 296 (BURGER, C.J. and STEWART and BLACKMUN, J.J. concurring in part and dissenting in part) (emphasis added). Hence, though the members of the Court reacted in differing ways to the issues presented by the *Oregon* v. *Mitchell* case, the opinions of each Justice are consistent with Appellants' view of the substantive content of the Amendment.

Applying these principles to Section 5 of the Act, it is clear that Congress exceeded the scope of its powers if it attempted to prohibit electoral changes solely on the basis of disproportionate racial impact. The Fifteenth Amendment prohibits discrimination *on account of* race, color, or previous condition of servitude. Therefore, Congress may only act to prohibit discrimination *on account of* race, color, or previous condition of servitude. Rome submits that "Congress may only 'enforce' the provisions of the amendments and may do so only by 'appropriate legislation.' " *Id.* at 128 (BLACK, J., announcing the judgments of the Court). The "provisions" of the Amendment do not include the proscription of innocent electoral changes and annexations. Moreover, such innocent actions may not be proscribed under authority to enact "appropriate legislation."

C. Congress may not through the creation of irrebuttable presumptions of invidious purpose proscribe actions having only a racially disproportionate impact.

The creation of an irrebuttable presumption of invidious purpose from the existence of racially disproportionate impact is not "appropriate legislation" to remedy intentional discrimination. Appellants have previously surveyed this Court's treatment of "irrebuttable presumptions." See pp. 27-28, ***supra***. The statutory infirmities of such presumptions are even more compelling in the constitutional context. Such presumptions, if indeed they were established by the Congress in 1965, are not "appropriate legislation" because of their inherent irrationality. In an analogous context, which provides the following paraphrase, this Court deemed such presumptions not to be appropriate because of the lack of any rational connection between the "naked statistical argument," and the constitutional value which Congress sought to protect:

> [G]iven the heterogeneity of the Nation's population, it would only be an *infrequent coincidence* that the racial composition of each [electoral change] was identical to that [previously in effect]. The acceptance of [the government's] theory would render suspect each difference in [racial impact], however lacking in racial motivation and however otherwise rational the treatment might be. Few legislative efforts to deal with the difficult problems posed by current [municipal government] could survive such scrutiny.

Jefferson v. *Hackney*, 406 U.S. 535, 548 (1972) (emphasis added).

D. Summary.

Appellants submit that if Section 5 of the Act prohibits electoral changes and annexations innocent of purposeful discrimination, it exceeded the powers constitutionally delegated to the Congress, because purposeful action is a precondition to the violation of the

Fourteenth and Fifteenth Amendments. Moreover, Congress may not, through its enforcement powers, expand the terms of the Amendments, and it may not proscribe such actions through the use of irrebuttable presumptions. If Appellants' view of the proper construction of Section 5 is not accepted, then Appellants assert that the provision must be declared unconstitutional.

IV. Section 5 of the Act Unconstitutionally Intrudes Upon Basic Concepts of Federalism and Rights Guaranteed by the First, Fifth, Ninth, and Tenth Amendments of the Constitution.

South Carolina v. *Katzenbach*, 383 U.S. 301 (1966), established the basic constitutional test against which legislation such as Section 5 must be measured: "[h]as Congress exercised its powers under the Fifteenth Amendment in an appropriate manner with relation to the States?" *Id.* at 324. This test was refined by Mr. Justice Black in *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), when he established the criteria for evaluating legislation enacted by Congress pursuant to its powers under Section Two of the Fifteenth Amendment, including the recognition that Congress may not strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority. *Id.* at 128.[56]

[56] The other criteria were, first, that Congress could only "enforce" the provisions of the Amendments by appropriate legislation, see p. 66, *supra*, and, second, that Congress may not by legislation repeal other provisions of the Constitution. Oregon v. Mitchell, 400 U.S. 112, 128 (1970). In the context of the case at bar, the "other provisions of the Constitution" are not only the Federalism principles of Article IV, Section 4 and the Tenth Amendment, see pp. 73-84, *infra*, but also the First, Fifth, Ninth, and Tenth Amendments, as protections of the rights of the citizens of Rome. See pp. 84-89, *infra*.

In *South Carolina* v. *Katzenbach*, this Court held that Section 5 was constitutional, but Chief Justice Warren indicated that the determination was based upon the circumstances then existing as well as the temporary nature of the Act. Appellants propose that the conditional nature of this constitutional imprimatur permits this Court to take a fresh look at the fundamental constitutional issue.[57] Appellants also argue that it is now apparent that the operation of Section 5 violates basic individual rights in a manner not anticipated when its constitutionality was first considered.

The limited sanction of the Act was indicated by the Court's reliance, in *South Carolina* v. *Katzenbach*, on *Wilson* v. *New*, 243 U.S. 332 (1917), and *Home Building & Loan Association* v. *Blaisdell*, 290 U.S. 398 (1934). *South Carolina* v. *Katzenbach* at 334-35. In *Wilson* v. *New*, the constitutional justification for the possible infringement upon due process rights was the necessity of the legislation to "save the . . . disaster, . . . injury, . . . suffering . . . which will be brought to many among the vast body of the people. . . ." 243 U.S. 342.

[57] The statement that Section 5 is constitutional has been supported by the frequent citation of many familiar cases, beginning, of course, with South Carolina v. Katzenbach, 383 U.S. 301 (1966). Indeed, the court below did so and cited United Jewish Organizations v. Carey, 430 U.S. 144, 157 (1977) (plurality opinion); *id.* at 180 n* (STEWART, J., concurring in the judgment); Beer v. United States, 425 U.S. 130, 133 (1976); Georgia v. United States, 411 U.S. 526, 553 (1973); Allen v. State Bd. of Elections, 393 U.S. at 548; Wilkes County v. United States, 450 F. Supp. 1171, 1177 (D.D.C.), *aff'd*, 99 S.Ct. 606 (1978). To that list could have been added Morris v. Gressette, 432 U.S. 491, 495 n.2 (1977) and Dougherty County Bd. of Educ. v. White, 99 S.Ct. 368, 372 n.6 (1978). South Carolina v. Katzenbach is fully discussed herein. Analysis of the other cases reveals that one held the Act constitutional as applied to the facts of that particular case (Georgia v. United States, 411 U.S. at 532-34), and the issue was not before the Court in the others.

The Court held the legislation appropriate under such circumstances. *Id.* at 351. *Home Building & Loan Association* v. *Blaisdell* involved a chailenge to the constitutionality of a Minnesota mortgage moratorium law that impaired the obligations of contracts but that was to remain in effect only during the continuance of an emergency and in no event beyond a given date. 290 U.S. at 416. The Court upheld the statute because the existing emergency "furnished a proper occasion for the exercise of a reserve power of the State to protect the vital interests of the community." *Id.* at 444. Among other factors this Court considered the statute to be constitutional because "[t]he legislation is temporary in operation." *Id.* at 447.

As in *Home Building & Loan Association* v. *Blaisdell* and *Wilson* v. *New,* this Court, in *South Carolina* v. *Katzenbach,* determined that Section 5 of the Act was appropriate legislation in light of "unique circumstances" then existing in the covered jurisdictions. Recently in *National League of Cities* v. *Usery,* 426 U.S. 833 (1976), this Court recognized the same principle when it overruled *Maryland* v. *Wirtz,* 392 U.S. 183 (1968), but sustained *Fry* v. *United States,* 421 U.S. 542 (1975). The Court, finding its holding in *National League of Cities* consistent with *Fry,* pointed out that:

> The enactment at issue there [in *Fry*] was occasioned by an extremely serious problem which endangered the well-being of all the component parts of our federal system and which only collective action by the National Government might forestall.

426 U.S. at 853. The Court pointed out that, unlike the situation in *Maryland* v. *Wirtz,* in enacting the Economic Stabilization Act of 1970,

> [t]he means selected were carefully drafted *so as not to interfere with the States' freedom beyond a very limited, specific period of time* . . . . [and the Act] displaced no state choices as to how governmental operations should be structured, nor did it force the States to remake such choices themselves.

Id. (emphasis added). Appellants submit that the choice of cases made by the Court in *South Carolina* v. *Katzenbach* to support the constitutionality of Section 5 permits a contemporary review of the appropriateness of Section 5.

The emergency to which the Act was directed in 1965 is demonstrated by the fact that in Mississippi only 6.8% of the voting age blacks were registered, in Alabama only 23.1%, in Louisiana 32.0%, in South Carolina 38.8%, in Georgia 44.1%, and in Virginia 45.8%.[58] As the Court noted in *South Carolina* v. *Katzenbach,* in many of these states, registration of voting age whites ran roughly 50 percentage points or more ahead of black registration. *South Carolina* v. *Katzenbach* at 313.

The contrast between the emergency of 1965 and the facts upon which Congress acted in extending the Act in 1975 is dramatic. As the report of the Senate Judiciary Committee indicated:

> The Voting Rights Act has been extremely effective in terms of diminishing barriers to and improving minority voting and registration throughout the covered areas. Registration rates for blacks in the covered southern jurisdictions has continued to increase since the passage of the Act. For exam-

[58] Figures originally published by Voter Education Project, Inc. 1972. Reprinted in *Hearings on S.407 et al. Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary,* 94th Cong., 1st Sess. at 658 (hereinafter cited as the *Senate Hearings of 1975*), reprinted from U.S. COMMISSION ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER 53 (1975).

ple, while only 6.7 percent of the black voting age population in Mississippi was registered before 1965, 63.2 percent of such persons were registered in 1971-1972.

S. REP. No. 94-295, 94TH CONG. 1ST SESS. at 13 (1975).

The registration data available to the Congress in 1975, with respect to black registration in 1972, indicated a national norm of 65.5% of the voting age population,[59] while in Mississippi the figure was 62.2%, in Alabama 57.1%, in Louisiana 59.1%, in South Carolina 48.0%, in Georgia 67.8%, and in Virginia 54.0%.[60] By 1976, the national percentage of the black voting age population registered to vote was 58.5%.[61] The figure for the northeastern portion of the United States was 54.7%.[62] In contrast, in Alabama 58.1% of the black voting age population was registered to vote, in Georgia the figure was 56.3% and in Louisiana 63.9%, in Mississippi 67.4%, in South Carolina 60.6%, and in Virginia 60.7%. *Id.*[63]

[59] U.S. Bureau of the Census, *Current Population Reports,* Series P-20, No. 253, *Voting and Registration in the Election of November 1972* (1973).

[60] *Senate Hearings of 1975, supra* note 58 at 658. Originally published by Voter Education Project, Inc., 1972. Reprinted from U.S. COMMISSION ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER 53 (1975).

[61] U.S. Bureau of the Census, *Current Population Reports,* Series P-20, No. 322, *Voting and Registration in the Election of November 1976* (1978).

[62] *Id.* at 122. "Northeast" includes Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont.

[63] U.S. Bureau of the Census, *Current Population Reports: Special Studies, Series P-23, No. 74, Registration and Voting in November, 1976 in Jurisdictions Covered by the Voting Rights Act Amendments of 1975* (1978).

This data, which is graphically illustrated below,[64] is an indication that the emergency with respect to which Congress acted in 1964 has passed and that this Court should look again at the remedies approved in *South Carolina* v. *Katzenbach,* as extended in 1975, and measure them against the constitutional principles of Federalism and the rights of political participation guaranteed to all citizens.

A. Section 5 encroaches upon basic concepts of Federalism.

The preclearance requirement of Section 5 is an extraordinary remedial provision which undeniably encroaches upon state sovereignty. One authority recently argued that a provision with such attributes violates

[64] PERCENTAGE OF PERSONS OF VOTING AGE REGISTERED

1964 Pres. Elect.	U.S.	ALA	GA	LA	MISS	S.C.	VA
All Persons	NA	NA	63.4	63.5	45.9	58.0	51.4
White	NA	70.0	74.6	80.5	70.2	78.5	56.0
Black	NA	23.1	44.1	32.0	6.8	38.8	45.8
1972 Pres. Elect.							
All Persons	72.3	76.2	70.0	75.2	65.5	59.1	56.9
White	73.4	80.7	70.6	80.0	71.6	51.2	61.2
Black	65.5	57.1	67.8	59.1	62.2	48.0	54.0
1976 Pres. Elect.							
All Persons	66.7	71.4	69.2	74.6	74.3	62.9	64.9
White	68.3	75.4	73.2	79.1	77.7	64.1	67.0
Black	58.5	58.1	56.3	63.9	67.4	60.6	60.7

not merely a particular provision of the Constitution such as the Guarantee Clause or the Tenth Amendment but the entire federal structure of the Constitution:

> Congressional action which treats the states in a manner inconsistent with their constitutionally recognized independent status, therefore, should be void, not because it violates any specific constitutional provision or transgresses the explicit boundaries of any specific grant of authority, but because it would be contrary to the structural assumptions of the Constitution as a whole.

TRIBE, *supra* note 17 at 301.

This Court gave contemporary significance to the principles of Federalism in *National League of Cities* v. *Usery*, 426 U.S. 833 (1966)[65] where it was held that Congress may not "impair the States 'ability to function effectively in a federal system,' " *id.* at 852 (citation omitted); the Federal Government may not intrude upon the exercise by the States of "integral government functions," *id.* at 851, necessary to their "separate and independent existence," *id.* at 845. The Court recognized that the rights of States *qua* States are affirmative limitations upon the powers of the central government in the same manner as the limitations imposed by the individual rights amendments to the Constitution. *Id.* at 845.[66] Furthermore, as the Court's opinion noted, these limitations extend to the rights of cities. *Id.* at 855-856, n.20.

[65] Other recent cases have addressed the concept of Federalism. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) and Hutto v. Finney, 437 U.S. 678, (1978) recognize the abrogation of the States' Eleventh Amendment immunity by the Fourteenth Amendment; however, those cases involved mere monetary recovery against States. Such an exercise of congressional power pales next to the significant and undeniable encroachment of Section 5 upon the functions most "essential to the separate and independent existence of the States and their governments"—elections. Oregon v. Mitchell, 400 U.S. 112, 125 (1970).

Integral and traditional governmental functions of a State and its political subdivisions include the conduct of elections and enactment of laws, especially where no discriminatory intent is present. Indeed, Appellees agree that this is so as a matter of fact, see App. at 85-86, and this Court has established it as a matter of law:

> No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution . . . the nature of their own machinery for filling local public offices.

Oregon v. *Mitchell*, 400 U.S. 112, 125 (1970).

Mr. Justice Black's dissents in *Perkins* v. *Matthews*, 400 U.S. at 401-09; *Allen* v. *State Board of Elections*, 393 U.S. at 595-97; and *South Carolina* v. *Katzenbach*, 383 U.S. at 355-362, recognized that Section 5 effectively gives federal officials a veto power over state and local laws, directly contrary to Article IV, Section 4 of the Constitution, which commands: "The United States shall guarantee to every State in this Union a Republican Form of Government." The concerns of Mr. Justice Black take on additional significance when viewed in the context of the broad scope given by this Court to Section 5. The list compiled in *Sheffield* speaks for itself:

> Our decisions have required federal preclearance of laws changing the location of polling places . . .

[66] Hence, congressional action affecting States must be "closely drawn." See p. 87, n. 78, *infra*.

> laws adopting at-large systems of elections . . . laws providing for the appointment of previously elected officials . . . laws regulating candidacy . . . laws changing voting procedures . . . annexations . . . and reapportionment and redistricting.

435 U.S. at 110 (citations omitted).

This Court in *In re Duncan,* 139 U.S. 449 (1891), in a unanimous opinion by Mr. Chief Justice Fuller, classically stated the scope of the Guarantee Clause:

> By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments, National and State, have been limited by written constitutions, and they have themselves thereby set bounds to their own power as against the sudden impulses of mere majorities.

Id. at 461. Mr. Justice Black's dissents indicate his concern that Section 5 violates the Guarantee Clause by creating two functionally dissimilar sets of States in the Union—one self-determined and one determined either by the Attorney General of the United States or by the District Court in Washington.

Appellants are aware of the substantial number of instances in which particular disputes relating to Article IV, Section 4 have been held to be nonjusticiable, as "political questions." *E.g., Luther* v. *Borden,* 48 U.S. (7 How.) 1 (1849). Indeed, the court below so held with respect to Rome's argument, citing *Luther* v. *Borden,* and *Baker* v. *Carr,* 369 U.S. 186 (1962). Juris. State. at 42b.[67] However, *Baker* v. *Carr* itself recognizes that "the mere fact that the suit seeks protection of a political right does not mean it presents a political question." 369 U.S. at 209.[68]

In deciding the justiciability of political questions, and "the distribution of power between this Court, the Congress, and the Chief Executive," *id.* at 242-43, the appropriateness of judicial deference to congres-

---

[67] Modern cases certainly give more than lip service to the provision. See Maryland v. EPA, 530 F.2d 215 (4th Cir. 1975), *vacated and remanded per curiam sub nom.* EPA v. Brown, 431 U.S. 99 (1977); Brown v. EPA, 521 F.2d 827 (9th Cir. 1975), *vacated and remanded per curiam,* 431 U.S. 99 (1977); Bauers v. Heisel, 361 F.2d 581 (3rd Cir. 1966) *cert. denied,* 386 U.S. 1021 (1967); Dawson v. Vance, 329 F. Supp. 1320 (S.D. Tex. 1971). These modern cases have acknowledged that while state sovereignty has been diminished in some areas by the exercise of congressional authority, "it is equally true that if there is any attribute of sovereignty left to the states it is the right of their legislatures to pass, or not to pass, laws." Maryland v. EPA, 521 F.2d at 225. The ability of the Attorney General, or actually of his staff, to render laws ineffective by refusing to preclear them is clearly a veto power. Such treatment of the laws of States and cities is hardly consistent with the Guarantee Clause. It is similar to the type of treatment recognized in Dawson v. Vance, 329 F.Supp. at 1326, as "opposite" to the Guarantee Clause: "to lightly subject state statutes . . . to precipitate and peremptory federal court equitable review absent extraordinary circumstances." Under Section 5, however, review may not even be judicial; it may be administrative. Indeed, one Justice of this Court has suggested that Section 5, which should be treated with "solemnity," may have been reduced to "a trivial, though burdensome, administrative provision." United States v. Board of Commissioners, 435 U.S. at 148 n.11 (STEVENS, J., dissenting).

[68] Quoting the same language from In re Duncan, 139 U.S. 449 (1891), quoted in the text above, Baker v. Carr observes, "But the Court did not find any of these fundamental principles violated." 369 U.S. at 222 n.48.

sional judgments concerning Federalism should be carefully examined,[69] because institutional safeguards may not always be present.[70] The argument against total judicial deference to congressional judgments concerning Federalism is even stronger when legislation intrudes on the Federalism interests of only a specified few states. Congressmen can be counted on

---

[69] Justice Douglas, in 1962, answered the following question, a form of which could easily be asked of Section 5, in the negative: "Today would this Court hold nonjusticiable or 'political' a suit to enjoin a Governor who, like Fidel Castro, takes everything into his own hands and suspends all election laws?" Baker v. Carr, 369 U.S. at 246 n.3 (DOUGLAS, J., concurring).

[70] Professor Herbert Wechsler has argued that the political power of the States, as represented in the structure of Congress, provides sufficient protection for the values of Federalism in the American system of government. Wechsler, ***The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government***, 54 COLUM. L. REV. 543 (1954). The doctrine received recent attention in Massachusetts v. United States, 435 U.S. 444 (1978), wherein it was noted that the political process is "uniquely adapted to accommodating the competing demands for national revenue, on the one hand, and for reasonable scope for the independence of state action, on the other." *Id.*, at 456. *See* Helvering v. Gerhardt, 304 U.S. 405, 416 (1938); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436-37 (1819). The Congress, "composed as it is of members chosen by state constituencies, constitutes an inherent check against the possibility of abusive taxing of the States by the National Government." Massachusetts v. United States, 435 U.S. at 456. But in a note to this portion of his opinion, Mr. Justice Brennan recognized a judicial role in restraining national encroachments on Federalism:

> Although the opinion for the Court in [*Usery*] rejects the argument that the operation of the political process eliminates any reason for reviewing federalism based challenges to federal regulation of the States *qua* States, we do not believe it follows that the existence of 'political checks' has no relevance to a determination of the proper *scope* of a State's immunity from federal taxation.

Id. at 456 n.13.

not so much to protect Federalism as to protect their home state's interests. When a statute affects only a small number of states, representatives safeguarding their states' interests are easily outvoted by those states not subject to the provision in question. The balance of state interests in the Senate and the political check offered thereby are thus upset; and one of the great values of Federalism, protection from arbitrary majoritarianism, is lost. With respect to Section 5, Justice Black perceived this reality. *See Perkins* v. *Matthews*, 400 U.S. 379, 401-407 (1971) (BLACK, J., dissenting). Other members of this Court have made similar observations. *See Berry* v. *Doles*, 438 U.S. 190, 200 n.5 (1978) (POWELL, J., concurring); *United States* v. *Board of Commissioners*, 435 U.S. at 139 n.1 (POWELL, J., concurring); *Georgia* v. *United States*, 411 U.S. 526, 545 n.1 (1973) (POWELL, J., dissenting); *Allen* v. *State Board of Elections*, 393 U.S. at 585 (HARLAN, J., concurring in part). Very recently Mr. Justice Rehnquist in *Columbus Board of Education* v. *Penick*, 47 U.S.L.W. 4924 (U.S. July 2, 1979) (No. 78-610), recognized this principle with his quotation of Cicero that there should not be "one law at Rome and another at Athens . . . but the same law." *Id.* at 4935.

The practical operation of Section 5 supports the conclusion that it is now unconstitutional. First, both of the procedures prescribed by Congress for obtaining preclearance of the electoral changes in a covered jurisdiction have proven intrusive and burdensome. The obvious costs to a covered jurisdiction of obtaining a declaratory judgment in a forum many miles away are underlined by the size of the record in the case presently before the Court and the fact that it has

been in litigation for over three years."[71] Because Congress recognized the onerousness involved in the declaratory judgment procedure, it provided what was to be a "rapid method" for covered jurisdictions to obtain preclearance of electoral changes. *Allen* v. *State Board of Elections,* 393 U.S. at 549. Yet, with the expanded interpretation which this Court has given to the phrase "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," the volume of submissions required from states, counties, cities, towns, and even organizations such as school boards which have no responsibility whatever for voting has reached significant proportions.[72] See App. at 171-180.

The intrusiveness of the burdens created by the Section 5 preclearance procedure is magnified by the statistics of the Justice Department indicating that, although it is receiving four submissions (and some with multiple changes) per day, see *Berry* v. *Doles,* 438 U.S. 190, 201 n.6 (1978), (POWELL, J., concurring in the judgment), the objection rate for Section 5 submissions is currently 0.2%. See p. 1c, *infra.* The preclearance procedure, having evolved into a mere "inventory of voting procedures," has become a "dead

[71] Although this burden would be substantial to any unit of government forced to shoulder it, it is even more serious to a city the size of Rome.

[72] A study was undertaken by the State of Texas to determine the burdensomeness of the Section 5 requirement on state officials alone and concluded that over 35,000 man-hours were devoted to compliance with Section 5 in less than a year. See Second Request by Plaintiffs for Admissions of Fact and Genuineness of Documents, Exhibit "B," City of Rome v. United States, No. 77-0797 (D.D.C. Apr. 9, 1979).

letter," *Georgia* v. *United States,* 411 U.S. 526, 531, 538 (1973), for any meaningful purposes and yet remains a "trivial, though burdensome, administrative provision," *United States* v. *Board of Commissioners,* 435 U.S. at 148 n.11 (BURGER, C.J., and REHNQUIST and STEVENS, J.J., dissenting), for both the plethora of covered jurisdictions and for the Attorney General. The scope of Section 5, as a purported remedy, goes far beyond the scope of the arguable violations ascertained, and when the compliance burden to covered jurisdictions is weighed against the resulting objections, the procedure is even less supportable. *See National League of Cities* v. *Usery,* 426 U.S. 833, 856 (1976) (BLACKMUN, J., concurring).

Section 5, designed as a mechanism to provide covered jurisdictions with a "rapid method" of preclearance, is not functioning in this manner. Although the statutory language of Section 5 and the regulations of the Attorney General require the Attorney General to act on a submission within sixty days, "catch 22's" abound. The sixty days do not begin until the Justice Department has received a "complete" submission, and "completeness" is wholly within the Department's unreviewable discretion. *Morris* v. *Gressette,* 432 U.S. 491, 507 (1977). The sixty-day period does not begin until the submission is received by the Justice Department, and the Justice Department may wait until the sixtieth day to mail an objection; and if the objection falls on a holiday, the Department has until the next working day. 28 C.F.R. 51.3 (1978) See pp. 2b-3b *infra.* A determination that a submission is "inadequate," and the consequent suspension of the sixty-day limitation,

is a "frequent" occurrence."[73] *Hearings on H.R. 939 et al. Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary,* 94th Cong., 1st Sess. Ser. 1 at 302 (1975) (hereinafter cited as *House Hearings of 1975*). In short, the sixty-day limitation is not, in fact, a protection to the covered jurisdictions.

Also, the administrative preclearance process is actually not a process at all but rather an imposition of the will of the Attorney General, or his staff, by administrative fiat. There is no provision for a hearing and there are no written standards of review; there is a confidential file unavailable to submitting jurisdictions; and there is no requirement of findings of fact. *See generally* p. 1b-19b, *infra.* Indeed, there is not even the necessity to reach conclusions that the change is discriminatory. As Justices White, Powell, and Rehnquist observed, in dissent, in *Georgia* v. *United States,* 411 U.S. at 543-544:

> [W]hy should the State be forced to shoulder that burden where its proposed changes are so colorless that the country's highest legal officer professes his inability to make up his mind as to its legality?

Notwithstanding the breadth of the power of the Attorney General, his discretion is not subject to judicial review, *Morris* v. *Gressette,* 432 U.S. 491, 507 (1977). Indeed, according to the court below, even the *constitutionality* of his actions is not subject to judicial review. See Juris. State. at 6a-7a, note 3. Affirming the holding of the court below, Appellants submit, would create a singular incidence of administrative supremacy. It would not follow relevant language in *Georgia* v. *United States,* 411 U.S. at 541 n.13 (1973), and, more importantly, it would be contrary to the principle that the ultimate question of constitutionality should always be entitled to judicial review. *See St. Joseph Stockyards Co.* v. *United States,* 298 U.S. 38 (1936); *Heikkila* v. *Barber,* 345 U.S. 229 (1953). It is difficult to imagine a process which is more offensive to principles of Federalism than one which determines the efficacy of a state's laws in the absence of either basic due process protections or judicial supervision. See App. at 176-78.

[73] It is not unlikely that declination of a submission as inadequate may be *used* to gain time. See App. at 86-88.

Finally, the requirements of Section 5, as interpreted by the Attorney General and the court below, impose a form of political orthodoxy on covered jurisdictions which is antithetical to the most basic concepts of Federalism. Notwithstanding the salutory effects that provisions such as majority vote, staggered terms, numbered posts, residency requirements, and annexations may have on a city's government, see Juris. State. at 47b, App. at 202-204, if the position of the Justice Department and the court below is upheld, it will be virtually impossible for covered jurisdictions to enact nondiscriminatory provisions of this type. *Id.* at 47b-49b. This imposition of a political "point of view" upon covered jurisdictions is precisely the evil of which Justice Holmes warned almost sixty years ago:

> There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States, even though the experiments may seem futile or even

noxious to me and to those whose judgment I most respect.

Truax v. *Corrigan*, 257 U.S. 312, 344 (1921) (HOLMES, J., dissenting). If the narrow view of "good government" adopted by the Attorney General and supported by the court below is allowed to prevent the enactment of progressive and, in some cases, even vital legislation by jurisdictions covered by the Act, the governmental experimentation allowed by a heterogeneous federal system will be frustrated."[74] See App. at 179-80.

B. The operation of Section 5 seriously infringes upon the constitutional rights of Private Appellants.

As a result of the operation of the preclearance procedures of Section 5, elections for local office in the City of Rome have not been held since 1974.[75]

[74] One commentator has characterized the problem connected with such interference in the local political process as follows:

> Neither the D.C. Court nor the Justice Department, in other words, can be certain that one electoral arrangement is superior to the other. And the cost of judicial and executive interference into local electoral arrangements is considerable. When the Federal government intervenes in local electoral arrangements—when it attempts not simply to augment political opportunities but also to shape electoral results—it deprives the citizens of their right to achieve through conflict and conciliation those electoral arrangements most suited to their needs. *Thernstrom, supra* at 64-65.

[75] In spite of the fact that the infeasibility of elections in Rome is "technical," see Juris. State. at 43b, it is no less real. Such a characterization by the court below, together with the finding that the freezing of elections was partially caused by the officials of the City of Rome, Appellants respectfully submit, demonstrates several inevitable results of the enforcement concept of Section 5: a failure to appreciate the sanctity and seriousness of state laws; a failure to acknowledge the evolution of Section 5 and the history of its enforcement; a failure to recognize the practicalities, hardships, and, most important, the time required to change state laws; and the understandable bewilderment of all citizens of localities like Rome at not having elections. See App. at 210-13.

Many of these difficulties arose because Section 5 "remained practically dormant for several years," *House Hearings of 1975, supra* at 1480. It had barely begun to be implemented in 1969 and 1970. *Id.* at 169, 1480. "The Department of Justice did not adopt regulations implementing § 5's preclearance provisions until September 1971, six years after this Court's decision in *Allen*, [393 U.S. 544 (1969)]." United States v. Board of Commissioners, 435 U.S. at 148 (STEVENS, J., dissenting). *See also* Berry v. Doles, 438 U.S. at 197 n.1 (POWELL, J., concurring).

This "electoral deadlock" gives rise to Private Appellants Hamler and Hunter's [76] challenge to Section 5 as violative of their right to political participation and indicates that the operation of Section 5 violates basic rights guaranteed by the First, Fifth, Ninth, and Tenth Amendments.

Scheduled elections have not been held in Rome because the reduction of wards from nine to three, enacted in 1966 at the same time as the electoral changes presently before this Court, was precleared by the Attorney General and therefore effectively amended Rome's Charter. When this *effective* provision is inserted into the existing Charter without the changes which have not been precleared, the result is that Rome's Charter provides for a total of three commissioners, one from each of three wards, yet in every other respect contemplates a nine-member commission. Hence, for instance, the Charter requires a quorum of five in order to conduct city business. See Plaintiffs' Post Argument Brief at 1. These inconsistencies in the city charter would render the City Commission power-

[76] Because the question of whether a city has First Amendment rights has apparently never been decided, see City of Madison v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 175 n.7 (1976), City of Rome *in parens patriae* was also a plaintiff below.

less as a government. Moreover, when the Attorney General objected to the changes presently before this Court, the City Commission and Board of Education were already operating on a staggered term basis, and thus, to return to the "old law," it would be necessary to cut short the terms of some office holders. In such cases, the Georgia State Constitution requires legislative action, a popular referendum, and positive election results prior to the curtailment of the term of elected office holders, *Ga. Code Ann.* § 2-1309 (1977); *Ga. Code Ann.* § 47-801 (1979), and each of these actions and stages would require preclearance. Elections and election results in this chaotic posture are practically impossible. The city has been "left more or less at sea." See *Georgia* v. *United States,* 411 U.S. 526, 544 (1973) (WHITE, J., dissenting). See also App. at 209-213.

In addressing this perplexing problem, the court below justified this calcification of the electoral process in the interest of "enforcing the Fifteenth Amendment," Juris. State. at 43b, and commented that "[i]n any event, a five year suspension of elections during Section 5 litigation is by no means unusual." Juris. State. at 41b n.77." Appellants Hamler, Hunter, and the City of Rome, *in parens patriae,* submit that such a suspension is not only unusual but is violative of their basic rights to political participation.

This Court has consistently recognized and protected the continuing availability of the franchise and the

[77] The court pointed out that, at the time of remand by this Court, in cases involving the respective cities, New Orleans' elections had been frozen for six years and Richmond's elections had been frozen for five years. Nevertheless this result of Section 5 epitomizes the intrusiveness of the provision. See App. at 210-13.

right to political participation for all citizens. *See Illinois State Board of Elections* v. *Socialist Workers Party,* 47 U.S.L.W. 4197 (U.S. Feb. 22, 1979) (No. 77-1248); *Dunn* v. *Blumstein,* 405 U.S. 330 (1972); *Harper* v. *Virginia Board of Elections,* 383 U.S. 663 (1966); *Reynolds* v. *Sims,* 377 U.S. 533 (1964); *Wesberry* v. *Sanders,* 376 U.S. 1 (1964); *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886). *See also First National Bank* v. *Bellotti,* 435 U.S. 765 (1978); *Elrod* v. *Burns,* 427 U.S. 347 (1976); *Buckley* v. *Valeo,* 424 U.S. 1 (1976).

The Framers of the Constitution never contemplated that Congress, much less the Attorney General, would establish or control electoral systems even for a "village alderman," *Oregon* v. *Mitchell,* 400 U.S. 112, 125 (1970).[78] Even more foreign to the Framers would have been the suggestion that local elections would be "frozen" by a federal veto of local election laws, especially in the absence of a constitutional violation. Nevertheless, the operation of Section 5 has had this result, and it flies in the face of recent rulings of this Court with respect to First Amendment freedoms. See *First National Bank* v. *Bellotti,* 435 U.S. at 780, 802; *Elrod* v. *Burns,* 427 U.S. at 373; *Buckley* v. *Valeo,* 424 U.S. at 48-49; *Rosario* v. *Rockefeller,* 410 U.S. 752, 766 (1973) (POWELL, J., dissenting).

[78] Section 5 applies to minor changes of minor political units. See Juris. State. at 14-15. The intention of Congress was that Section 5 be given the "broadest possible scope." Allen v. State Bd. of Elections, 393 U.S. at 567. This breadth constitutes, in the context of First Amendment freedoms, *overbreadth*. See Elrod v. Burns, 427 U.S. 347, 362-363 (1976); First Nat'l Bank v. Bellotti, 435 U.S. 765, 786 (1978). Section 5 fails in the requirement that it be "closely drawn to avoid unnecessary abridgement," Buckley v. Valeo, 424 U.S. 1, 25 (1976).

Bellotti recently affirmed the principle that: "Freedom of speech and the other freedoms encompassed by the First Amendment always have been viewed as fundamental components of the liberty safeguarded by the Due Process Clause . . . ." 435 U.S. at 780. It requires no citation of authority to establish that due process requires application of objective standards and a hearing before property or liberty may be deprived. However, a review of the text of Section 5 reveals no provision for a hearing nor any standards by which the electoral system of the City of Rome is to be judged by the Attorney General. The Attorney General's regulations similarly do not provide for a hearing.

The "objection letter" of the Assistant Attorney General directed to the electoral changes of Rome, App. at 131, 139, typical of such letters, is conclusory only (albeit conclusory of an inability to conclude) and lacks any specific findings of fact or any indication of the sources of information on which the decision was based. The absence of any textual limitation upon the actions of the Attorney General, including the absence of a provision for a hearing, is aggravated by the unavailability of judicial review under *Morris* v. *Gressette,* 432 U.S. 491 (1977).[79] Section 5, an admittedly "severe" remedy, lacks in basic constitutional protections and denies Appellants Hamler and Hunter due process of law.

Appellants Hamler and Hunter, as a result of the freezing effect of Section 5, have been unable to vote, to express their political beliefs, to engage in political activities, to associate politically to advance ideas, to support candidates, to be candidates, and to defeat

[79] Indeed, the actions of the Attorney General are not even subject to discovery. See Juris. State. at 7a.

candidates. Many of these activities are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts,* 291 U.S. 97, 105 (1934). In Appellants' view these are First Amendment rights guaranteed by the Fifth Amendment against impairment; however, even if the rights of the citizens of Rome are not "fundamental," they should be deemed "penumbral" rights reserved to the people of Rome and similarly situated cities by the Ninth and Tenth Amendments. Appellants Hamler and Hunter argue that, aside from rights and powers their state and city may retain by virtue of principles of Federalism, they, as individuals, have suffered the loss of rights guaranteed by the First, Fifth, Ninth, and Tenth Amendments. Similar contentions were "accepted" by this Court in *United Public Workers* v. *Mitchell,* 330 U.S. 75, 94-95 (1947).

Appellants Hamler and Hunter share the indignity and frustration suffered by their City as a jurisdiction covered by the Act. They are directly affected by their inability to reap the benefits of local experimentation and improvements in government. They seek to have restored and protected their rights of political participation, not under the Fifteenth Amendment, but under the "other provisions" of the Constitution. This is especially appropriate where their government has been responsive and free of racial animus.

V. The Electoral Changes and Annexations Presently Before This Court Have Been Precleared by the Attorney General.

In light of the burden imposed upon covered jurisdictions by the declaratory judgment procedure of Section 5, Congress provided an administrative alterna-

tive, requiring the Attorney General to interpose an objection to submitted legislation within sixty days after receipt, or the matters submitted are deemed effective. *See Morris* v. *Gressette,* 432 U.S. 491, 495 (1977). This appeal presents two important issues relating to the function of the Attorney General under Section 5, the resolution of which are essential to its equitable administration.

A. Preclearance of the Georgia Municipal Election Code.

Beginning in 1966, the electoral changes presently before the Court were enacted by the Georgia General Assembly. See p. 11, *supra.* As indicated above, the General Assembly enacted, in 1968, the Georgia Municipal Election Code, (hereinafter cited as the "Municipal Code"), which applies to all municipal elections in Georgia. *Id.* The Municipal Code provided for the use of numbered posts, established a state-wide majority vote requirement, unless otherwise provided in a city's charter, and attendant run-off election procedures. The Attorney General of Georgia formally submitted the Municipal Code for preclearance. App. at 96-107. The Section 5 submission by Georgia clearly highlighted the Municipal Code's majority vote, run-off election, and numbered-post requirements. *Id.* at 100. More specifically, the submission stated that the majority vote requirement would apply if the city charter was then so "written" and that the "post" provision would apply if the city charter "calls for it." *Id.* Although the Justice Department objected to certain features of the Municipal Code, it expressed no reservations with respect to the majority vote, run-off

election, and numbered posts provisions, *id.* at 52-56,[80] and, therefore, this legislation was implemented.

In spite of preclearance of the Municipal Code, the Justice Department informed Rome officials, eight years later, that Rome's own numbered post, majority vote, and run-off election provisions, which are functionally identical to the state-wide provisions,[81] had not been precleared. This position was upheld by the court below.

The question before this Court is whether preclearance by the Justice Department of the 1968 Municipal Code constituted preclearance of the numbered post, majority vote, and run-off election provisions made as amendments to Rome's Charter, beginning in 1966. Three factors indicate that this question should be answered affirmatively.

First, the amendments to Rome's Charter enacted prior to 1968, dealing with numbered posts, majority vote and run-off elections, were affirmatively incorporated into the 1968 Municipal Code as a matter of positive law and thereby submitted to the Justice Depart-

---

[80] The Justice Department, in responding to the submission by Georgia, objected to the use of various features of the 1968 Georgia Municipal Election Code in certain jurisdictions. Moreover, it requested the names of the cities to which certain provisions would apply. However, with respect to the majority vote, run-off elections, and numbered posts, no such reservation or request was made. App. at 52-56.

[81] *Compare* Juris. State. at 1e-27e *with* Juris. State. 1d-3d. Since, in Georgia, the state legislature, and not municipalities, is vested with the authority to regulate municipal elections, no subsequent action on the part of municipalities is required to effectuate numbered posts, majority vote, and run-off elections. *See* GEORGIA CODE ANN. §§ 69-309 to 69-310 (1976 & Cum. Supp. 1979).

ment. The relevant provisions of the Municipal Code unambiguously provide that existing numbered post, majority vote, and run-off election provisions govern the conduct of municipal elections. Juris. State. at 1d-3d. With respect to such provisions enacted prior to 1968, the Municipal Code makes them law.

An analogous issue, the effect of preclearance of state-wide electoral changes on county elections in Georgia, was determined in *United States* v. *Georgia*, No. C76-1531A (N.D. Ga., Sept. 30, 1977), *aff'd. mem.* 98 S.Ct. 2840 (1978), dealing with the Georgia Election Code of 1964 (the "State Code"). This statute, *Ga. Code Ann.* § 34-102 (1970), governs federal, state, county, but not municipal elections; and it also contains numbered post, majority vote, and run-off elections provisions. *Ga. Code Ann.* §§ 34-1015, 34-1513 (1970).[82] In that case, the court rejected the United States' petition that the implementation of the numbered post, majority vote, and run-off election requirements, in primaries and elections for county governing

[82] In that case, the United States asserted, with respect to the 1964 Georgia Election Code, that the Attorney General did not give specific attention to the numbered posts and majority vote features of that Code. The three-judge court in the United States District Court for the Northern District of Georgia held that the 1964 Georgia Election Code was properly presented to the Attorney General, and the majority vote and numbered posts provisions were, in fact, precleared. This Court summarily affirmed. Thus, county governments in Georgia are authorized to utilize these common electoral features. The court below has thus created the following anomaly: while counties and the State may utilize numbered posts and majority vote provisions, Georgia cities cannot use identical features because the State of Georgia allegedly did not submit " 'in an unambiguous and recordable manner' *all* municipal charter provisions," Juris. State. at 25b (emphasis added).

bodies, be enjoined. The court held that preclearance by the Attorney General, beginning in 1968, of the State Code constituted preclearance of all provisions contained therein, including those relating to county elections. See Jurisdictional Statement of the United States in United States v. Georgia, No. C76-1531A (N.D. Ga., Sept. 30, 1977), *aff'd. mem.*, 98 S.Ct. 2840 (1978).

Second, in light of the fact that the Municipal Code affects only municipalities, its preclearance by the Attorney General is pointless unless all of the local electoral provisions which it enacts are deemed to be precleared.

Third, if covered jurisdictions are to rely upon preclearance as a rapid and efficient means of implementing their laws, the Attorney General must be bound to respect prior Justice Department determinations. Although the Justice Department may alter its enforcement policies, such alterations should be only prospective. Rome officials reasonably assumed that numbered post, majority vote, and run-off election provisions, as electoral mechanisms, were precleared upon approval of the Municipal Code, and that the Municipal Code could be relied upon. Indeed, Rome did rely upon the Code, see Juris. State. at 23e, in at least four elections. See p. 15, *supra*. For these reasons the majority vote, run-off election, and numbered post provisions of Rome should be deemed precleared by virtue of preclearance of the Municipal Code.

B. Failure by the Attorney General to Object in a Timely Manner.

During the preclearance process, Rome moved, on May 24, 1976, for reconsideration of the Attorney General's previous objection to its electoral changes and

annexations. This motion was acknowledged by the Attorney General. On July 14, 1976, before the Attorney General had responded, and without solicitation, the City supplemented its request with two affidavits which the court below recognized were "brief . . . [and] hardly of a nature to impose a significant burden on the Attorney General," see Juris. State. at 28b, n.64. The affidavits were not acknowledged. The Attorney General did not respond until August 12, 1976.

Regulations governing preclearance pursuant to Section 5, as approved by this Court in *Georgia* v. *United States,* 411 U.S. 526 (1973), provided that if the Attorney General objects to a submission, the submitting authority may seek reconsideration, and the Attorney General must decide within sixty days of receipt of a request for reconsideration whether to withdraw or continue his objection, provided that he has at least fifteen days to object following a conference held at the submitting authority's request. 28 C.F.R. §§ 51.3 (d), 51.10(a), 51.18(a), and 51.24 (1978). There is no provision in the regulations providing that the sixty-day period in which the Attorney General must respond to a request for reconsideration is tolled by voluntary supplementation of a submission. To the contrary, Sections 51.3(d) and 51.24, which make a conference held at a submitting authority's request the sole condition for an extension of the sixty-day period, strongly suggest that if additional conditions for extending the period had been contemplated, they would appear in the regulations.

Rome contended below that the statutory sixty-day period began on May 24, 1976, the date of the initial request for reconsideration, and that the Attorney

General, having failed to respond within the required time, precleared the changes. Appellees contended that the period began on July 14, 1976, and that the response was thus timely. The District Court found that the relevant period "commence[s] anew" when the Attorney General receives an unsolicited supplement to a submission. See Juris. State. at 28b. This holding is contrary to the Attorney General's own regulations, 28 C.F.R. §§ 51.3, 51.10(a) and 51.18 (1978).

It is clear that all submissions by Rome were complete as of the receipt by the Justice Department of the request for reconsideration on May 24, 1976. This is established by virtue of the Attorney General's letter of acknowledgement of May 25, 1976. The letter states that thirteen annexations and the electoral changes were still under consideration, and the record is clear that no determination of inadequacy or further requests for information were made by the Attorney General. The letter did not advise Rome that the sixty-day period was tolled pursuant to § 51.18. App. at 154-156. The voluntary submission of two supplementary affidavits by Rome did not, under the regulations, toll the sixty-day time period. *See also* 28 C.F.R. § 51.3(d). Neither Section 5 of the Act, nor the Attorney General's regulations, permit such an extension of the sixty-day period for response to a request for reconsideration.

No significant policy of the Act is served by extending the sixty-day period as the court below has done. Presumably, information, such as that contained in Rome's supplementation, is not required by the Attorney General in order to decide upon a request for reconsideration, or he would have requested it. The submitting authority's interests clearly lie in providing

such information as quickly as possible in order to insure that it will be considered by the Attorney General in his decision-making process. Careful consideration of the purpose of the preclearance mechanism argues for strict adherence by the Attorney General to the regulations governing the time period in which he must respond to requests for reconsideration. Any other course would undermine the congressional objective of providing a rapid method of reviewing legislation from covered jurisdictions.

Under *Georgia* v. *United States*, the Attorney General is allowed to object "by simply saying that he cannot make up his mind." *Id.* at 545. However, Appellants believe that he must object within sixty days, rather than eighty.

CONCLUSION

The judgments of the District Court, dismissing Appellants' case and granting Appellees' motions for summary judgment, should be reversed. In order that complete relief might be obtained, Appellants pray that Rome be exempted from the Act or that Section 5 of the Act be declared unconstitutional. Such a holding is necessary, Appellants submit, in order that Rome and other jurisdictions innocent of purposeful discrimination might function effectively in the Federal system, free of the burdens of Section 5. In the absence of either such holding, Appellants pray that the electoral changes and annexations at issue be declared to be effective.

Respectfully submitted,

ROBERT M. BRINSON
City Attorney of Rome, Georgia
Brinson, Askew & Berry
200 North Fifth Avenue
Rome, Georgia 30161
(404) 291-8853

WILLIAM E. SUMNER
BURTON B. GOLDSTEIN, JR.
BARBARA A. SPECK
Long, Aldridge, Heiner,
Stevens & Sumner
1900 Rhodes-Haverty Building
Atlanta, Georgia 30303

JOSEPH W. DORN
Kilpatrick & Cody
2033 K Street, N.W.
Suite 400
Washington, D.C. 20006

Counsel for Appellants

APPENDIX

APPENDIX A

THE CONSTITUTION OF THE UNITED STATES OF AMERICA

ARTICLE IV

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

AMENDMENT I [1791]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT IX [1791]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X [1791]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the

United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Amendment XV [1870]

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

APPENDIX B

PROCEDURES FOR THE ADMINISTRATION OF SECTION 5 OF THE VOTING RIGHTS ACT OF 1965, 28 C.F.R. PART 51 (1978)

Subpart A—General Provisions

§ 51.1 Purpose.

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, prohibits the enforcement in any jurisdiction covered by section 4(a) of the Act, 42 U.S.C. 1973b, of any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on the date used to determine coverage, until the authority proposing enforcement either (a) obtains from the U.S. District Court for the District of Columbia a declaratory judgment that the plan does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or (b) the plan has been submitted to the Attorney General and he has interposed no objection within a 60-day period following submission. In order to carry out his responsibilities under this section of the Voting Rights Act and to make clear his interpretation of the responsibilities imposed on other individuals and entities thereunder, the procedures in this part shall govern the administration of section 5.

§ 51.2 Definitions.

(a) The terms "vote" and "voting" are used herein as defined in the Voting Rights Act of 1965, to include all action necessary to make a vote effective in any primary, special, or general election, including but not limited to, registration, listing pursuant to the Voting Rights Act of 1965, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with

respect to candidates for public or party office and propositions for which votes are received in an election.

(b) The term "change affecting voting," as used herein, shall mean any voting qualification, prerequisite to voting, standard, practice, or procedure different from that in force or effect on the date used to determine coverage by section 4(a) (November 1, 1964 or November 1, 1968, as the case may be) and shall include, but not be limited to, the examples given in § 51.4(c).

(c) The term "submission" as used herein shall mean presentation to the Attorney General by an appropriate official of any change affecting voting and an explanation of the difference between the change and the existing law or practice and such appropriate supporting materials as are included to demonstrate that the voting qualification, prerequisite to voting, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.

(d) "Attorney General" shall mean the Attorney General of the United States or his delegate.

(e) The term "submitting authority" shall mean the party responsible for submitting a voting change on behalf of a State or political subdivision under § 51.8 or any other person or persons empowered to represent or act on behalf of a State or political subdivision with respect to a submission under section 5.

§ 51.3 Computation of time.

(a) The Attorney General shall have 60 days in which to interpose an objection to a submitted change affecting voting.

(b) The 60-day period shall commence upon receipt by the Department of Justice of a submission from an appropriate official, which submission satisfies the requirements

of § 51.10(a). Procedures for requesting additional material and for determining the commencement of the 60-day period when a submission is inadequate are described in § 51.18.

(c) The 60-day period shall mean 60 calendar days, provided that if the final day of the period should fall on a Saturday, Sunday, or national holiday the Attorney General shall have until the close of the next full business day in which to interpose an objection. The date of the Attorney General's response shall be the date on which it is mailed to the submitting authority.

(d) When the Attorney General objects to a submitted change affecting voting, and the submitting authority seeking reconsideration of the objection brings additional information to the attention of the Attorney General, the Attorney General shall decide within 60 days of receipt of a request for reconsideration (provided that he shall have at least 15 days following a conference held at the submitting authority's request) whether to withdraw or to continue his objection.

§ 51.4 Requirement of action for declaratory judgment or submission to Attorney General.

Section 5 requires that, prior to enforcement of any change affecting voting, the State or political subdivision which has enacted or seeks to administer the change affecting voting must obtain either a judicial or an executive determination that denial or abridgment of the right to vote on account of race or color is not the purpose and will not be the effect of the change. It is illegal to enforce a change affecting voting without complying with section 5. The obligation to obtain such judicial or executive review is not relieved by illegal enforcement.

The Attorney General may bring suit or take other appropriate action to prevent or redress any denial of the right to vote on account of race or color. See 42 U.S.C. 1973j.

(a) All changes affecting voting, even though the change appears to be minor or indirect, to expand voting rights or to remove the elements which caused objection by the Attorney General to a prior submission, must either be submitted to the Attorney General or be made the subject to an action for declaratory judgment in the U.S. District Court for the District of Columbia.

(b) A submission to the Attorney General does not affect the right of the submitting authority to bring a suit in the U.S. District Court for the District of Columbia at any time, seeking a declaratory judgment that the change affecting voting does not have a racially discriminatory purpose or effect.

(c) Legislation and administrative actions constituting changes affecting voting covered by section 5 include, but are not limited to, the following examples:

(1) Any change in qualifications or eligibility for voting;

(2) Any change in procedures concerning registration, balloting, or informing or assisting citizens to register and vote;

(3) Any change in the constituency of an official or the boundaries of a voting unit (e.g., through redistricting, annexation, or reapportionment), the location of a polling place, change to at-large elections from district elections or to district elections from at-large elections;

(4) Any alteration affecting the eligibility of persons to become or remain candidates or obtain a position on the ballot in primary or general elections or to become or remain officeholders or affecting the necessity of or methods for offering issues and propositions for approval by voting in an election;

(5) Any change in the eligibility and qualification procedures for independent candidates;

(6) Any action extending or shortening the term of an official or changing the method of selecting an official (e.g. a change from election to appointment);

(7) Any alteration in methods of counting votes.

Subpart B—Procedures for Submission to the Attorney General

§ 51.5 Form of submissions.

Submissions may be made in letter or any other written form, as long as the change affecting voting that is being submitted is clearly set forth in compliance with § 51.10(a) and the name and title of the individual and the State or political subdivision which he represents are disclosed. Submissions should be made in duplicate.

§ 51.6 Time of submissions.

Changes affecting voting should be submitted as soon as possible after the enactment or administrative decision is made and are required by law to be submitted prior to enforcement.

§ 51.7 Premature submissions returned.

The Attorney General will return without decision on the merits any proposal for a change affecting voting which has been submitted prior to final enactment or final administrative decision, provided that regarding a change as to which approval by referendum or by a court is required (e.g., an amendment to a State constitution or a reapportionment plan), the Attorney General may consider and issue a decision concerning the change prior to the referendum or the action of the court if all other action necessary for adoption has been taken.

§ 51.8 Party responsible for submitting.

Changes affecting voting shall be submitted by the chief legal officer or other appropriate official of the State or

political subdivision in which the change is proposed to be effective. When one or more counties within a State will be affected, the State may submit a change affecting voting on behalf of the covered county or counties.

§ 51.9 Address for submissions.

Changes affecting voting shall be delivered or mailed to: Assistant Attorney General, Civil Rights Division, Department of Justice, Washington, D.C. 20530. The envelope and first page of any submission shall be clearly marked: Submission under section 5, Voting Rights Act.

§ 51.10 Contents of submissions.

(a) Each submission shall include:

(1) A copy of any legislative or administrative enactment or order embodying a change affecting voting, certified by an appropriate officer of the submitting authority to be a true copy.

(2) The date of final adoption of the change affecting voting.

(3) Identification of the authority responsible for the change and the mode of decision (e.g., act of State legislature, ordinance of city council, redistricting by election officials).

(4) An explanation of the difference between the submitted change affecting voting and the existing law or practice, or explanatory materials adequate to disclose to the Attorney General the difference between the existing and proposed situation with respect to voting. When the change will affect less than the whole State or subdivision, such explanation should include a description of which subdivisions or parts thereof will be affected and how each will be affected.

(5) A statement certifying that the change affecting voting has not yet been enforced or administered, or an explanation of why such a statement cannot be made.

(6) With respect to redistricting, annexation, and other complex changes, other information which the Attorney General determines is required to enable him to evaluate the purpose or effect of the change. Such other information may include items listed under paragraph (b) of this section. When such other information is required, the Attorney General shall notify the submitting authority in the manner provided in § 51.18(a).

(b) In addition to the requirements listed in paragraph (a) of this section, each submission may include appropriate supporting materials to assist the Attorney General in his consideration. The Attorney General strongly urges the submitting authority to include the following information insofar as it is available and relevant to the specific change submitted for consideration:

(1) A statement of the reasons for the change affecting voting.

(2) A statement of the anticipated effect of the change affecting voting.

(3) A statement identifying any past or pending litigation concerning the change affecting voting or related prior voting practices.

(4) A copy of any other changes in law or administration relating to the subject matter of the submitted change affecting voting which have been put into effect since the time when coverage under section 4 of the Voting Rights Act began and the reasons for such prior changes. If such changes have already been submitted the submitting authority may refer to the date of prior submission and identify the previously submitted changes.

(5) Where any change is made that revises the constituency which elects any office or affects the boundaries of any geographic unit or units defined or employed for voting purposes (e.g., redistricting, annexation, change from district to at-large elections) or changes the location of a polling place or place of registration, a map of the area to be affected showing the following:

(i) The existing boundaries of the voting unit or units sought to be changed.

(ii) The boundaries of the voting unit or units sought by the change.

(iii) Any other changes in the voting unit boundaries or in the geographical makeup of the constituency since the time that coverage under section 4 began. If such changes have already been submitted the submitting authority may refer to the date of the prior submission and identify the previously submitted changes.

(iv) Population distribution by race within the existing units.

(v) Population distribution by race within the proposed units.

(vi) Any natural boundaries or geographical features which influenced the selection of boundaries of any unit defined or proposed for the new voting units.

(vii) Location of polling places.

(6) Population information: (i) Population before and after the change, by race, of the area or areas to be affected by the change. If such information is contained in the publications of the U.S. Bureau of the Census, a statement to that effect may be included.

(ii) Voting-age population and the number of registered voters before and after the change, by race, for the area to be affected by the change. If such information is contained

in the publications of the U.S. Bureau of the Census, a statement to that effect may be included.

(iii) Copies of any population estimates, by race, made in connection with adoption of the proposed change, preparation of the submission or in support thereof and the basis for such estimates.

(iv) Where a particular office or particular offices are involved, a history of the number of candidates, by race, who have run for such office in the last two elections and the results of such elections.

(7) Evidence of public notice or opportunity for the public to be heard. In examining submissions, consideration may be given, where appropriate, to evidence of public notice and opportunity for interested parties to participate in the decision to adopt or implement the proposed change and to indications that such participation in fact took place, or to evidence of notice to the public that a submission has been made soliciting comment by the public to the Department of Justice. Examples of materials demonstrating public notice or participation include:

(i) Copies of newspaper articles discussing the proposed change.

(ii) Copies of public notices (and statements regarding where they appeared, e.g., newspaper, radio, or television, posted in public buildings, sent to identified individuals or groups) which describe the proposed change and invite public comment or participation in hearings, or which announce submission to the Attorney General and invite comments for his consideration.

(iii) Minutes or accounts of public hearings concerning the proposed changes.

(iv) Statements, speeches, and other public communications concerning the proposed changes.

(v) Copies of comments from the general public.

(vi) Excerpts from legislative journals containing discussion of a submitted enactment, or other materials revealing its legislative purpose.

(8) Where information requested herein is relevant but not known and not believed to be available, submissions should so state.

(9) Where information furnished reflects an estimation, submissions should identify the individual and state his qualifications to make the estimate.

(10) Submissions should identify in general the source of any information they supply.

(11) When a submitting authority desires the Attorney General to consider any information which has been supplied in connection with an earlier submission, incorporation by reference may be accomplished by stating the date and subject matter of the earlier submission and identifying the relevant information therein.

§ 51.11 Request for notification concerning voting litigation.

When a State or political subdivision subject to section 5 becomes involved in any litigation concerning voting, it is requested that prompt notification be sent to the Assistant Attorney General, Civil Rights Division, Department of Justice, Washington, D.C. 20530. Such notification will not be considered to be a submission under section 5.

Subpart C—Communications From Individuals or Groups

§ 51.12 Communications concerning voting changes.

Any individual or group may send to the Attorney General information concerning a change affecting voting in an area to which section 5 of the Voting Rights Act applies.

(a) Communication may be in the form of a letter stating the name and address of the individual or group, describing the alleged change affecting voting and setting forth evidence regarding whether the change has or does not have a discriminatory purpose or effect or simply stating a desire that the change be called to the attention of the Attorney General. Two copies of each communication should be mailed to the Assistant Attorney General, Civil Rights Division, Department of Justice, Washington, D.C. 20530. The envelope and the first page of each communication should be marked: Comment, section 5, Voting Rights Act.

(b) Comments by individuals or groups concerning any change affecting voting may be submitted at any time; however, they should be submitted as soon as possible after the change affecting voting is brought to the attention of the individual or group.

(c) Department of Justice officials and employees shall comply with the request of any individual that his identity not be disclosed to any person outside the Department. In addition, whenever it appears to the Attorney General that disclosure of the identity of an individual who provided information regarding a change affecting voting could jeopardize the personal safety, employment, or economic standing of the individual, the identity of the individual shall not be disclosed to any person outside the Department of Justice.

(d) When an individual or group desires the Attorney General to consider information which has been supplied in connection with an earlier submission, incorporation by reference may be accomplished by identifying the earlier submission by date and subject matter and identifying the relevant information or related communication.

§ 51.13 Establishment and maintenance of registry of interested individuals and groups.

The Attorney General shall establish and maintain a Registry of Interested Individuals and Groups. Such registry shall contain the name, address, and telephone number of any individual or group that requests inclusion therein for purposes of receiving notice of section 5 submissions. Each registrant shall specify the area of areas with respect to which notification is requested.

§ 51.14 Communications concerning voting suits.

Individuals and groups are urged to notify the Assistant Attorney General, Civil Rights Division, of litigation concerning voting in areas subject to section 5.

§ 51.15 Action on communications from individuals or groups.

(a) If the person or entity responsible for submitting the change affecting voting has submitted the change to the Attorney General, any evidence from individuals or groups shall be considered along with the materials submitted and materials resulting from any investigation.

(b) If no submission (as defined in § 51.2(c)) has been made, the Attorney General shall advise the person or entity responsible for the alleged change of the duty to seek a declaratory judgment or to make a submission to the Attorney General before enforcement.

(c) Where no submission has been made and no declaratory judgment has been sought and a change affecting voting is enforced or is about to be enforced in a covered jurisdiction, the Attorney General may bring suit or take other appropriate action to enforce compliance with section 5 and to prevent or redress any denial or abridgment of the right to vote on account of race or color. See 42 U.S.C. 1973j.

Subpart D—Processing of Submissions

§ 51.16 Notice to registrants concerning submission.

When the Attorney General receives a section 5 submission, prompt notice thereof shall be given to the individuals and groups who have registered for this purpose in accordance with § 51.13. Such notice shall be sent to each such registrant who has requested notification concerning the area or areas affected by the submitted change.

§ 51.17 Return of inappropriate submissions.

The only changes authorized by section 5 to be submitted to and passed upon by the Attorney General are those affecting voting rights. The Attorney General shall therefore examine and make a response on the merits to only those submissions affecting voting. All others shall be returned to the submitting party without comment on their merits.

§ 51.18 Obtaining information regarding submissions.

(a) If the submission does not satisfy the requirements of § 51.10(a), the Attorney General shall request such further information as is necessary from the submitting authority and advise the submitting authority that the 60-day period will not commence until such information is received by the Department of Justice. The request shall be made as promptly as possible after receipt of the original inadequate submission.

(b) After receipt of a submission which satisfies the requirements of § 51.10(a), the Attorney General may at any time during the 60-day period:

(1) Request additional information from the submitting authority,

(2) Request information from other local authorities or interested individuals or groups,

(3) Conduct such investigation or inquiry as he deems appropriate.

(c) If the submission does not contain adequate evidence of notice to the public, and the Attorney General believes that racial purpose or effect is possible, he may take steps to provide public notice sufficient to invite interested citizens to provide evidence as to the presence or absence of racially discriminatory purpose or effect. The authority responsible for the submission shall be advised when any such steps are taken by the Attorney General.

§ 51.19 Standard for decision concerning submissions.

Section 5, in providing for submission to the Attorney General as an alternative to seeking a declaratory judgment from the U.S. District Court for the District of Columbia, imposes on the Attorney General what is essentially a judicial function. Therefore, the burden of proof on the submitting authority is the same in submitting changes to the Attorney General as it would be in submitting changes to the District Court for the District of Columbia. The Attorney General shall base his decision on a review of material presented by the submitting authority, relevant information provided by individuals or groups, and the results of any investigation conducted by the Department of Justice. If the Attorney General is satisfied that the submitted change does not have a racially discriminatory purpose or effect, he will not object to the change and will so notify the submitting authority. If the Attorney General determines that the submitted change has a racially discriminatory purpose or effect, he will enter an objection and will so notify the submitting authority. If the evidence as to the purpose or effect of the change is conflicting, and the Attorney General is unable to resolve the conflict within the 60-day period, he shall, consistent with the above-described burden of proof applicable in the District Court, enter an objection and so notify the submitting authority.

§ 51.20 Notification of decision not to object.

(a) If the Attorney General decides to interpose no objection to a submitted change affecting voting, the submitting authority shall be notified to that effect.

(b) The notification shall state that the failure of the Attorney General to object does not bar subsequent litigation to enjoin enforcement of the change.

(c) A copy of the notification shall be sent to any party who has commented on the submission or has requested notice of the Attorney General's action thereon.

§ 51.21 Notification of decision to object.

(a) When the Attorney General decides to interpose an objection, the submitting authority shall be notified within the 60-day period allowed. The reasons for the decision shall be stated.

(b) The submitting authority shall be advised that the Attorney General will reconsider his objection upon a request by the submitting authority within 10 days of such objection, for an opportunity to present further substantiating or explanatory information which was not previously available to the submitting authority. In appropriate cases, the Attorney General may request that local public notice of the request for reconsideration be given by the submitting authority.

(c) The submitting authority shall be advised further that it may request a conference with a representative of the Department of Justice to reconsider an objection when such new information has become available.

(d) A copy of the notification shall be sent to any party that has commented on the submission or has requested notice of the Attorney General's action thereon.

§ 51.22 Expedited consideration.

When a submitting authority demonstrates good cause for special expedited consideration to permit enforcement of a change affecting voting within the 60-day period following submission (good cause will, in general, only be found to exist with respect to changes made necessary by circumstances beyond the control of the enacting or submitting authorities), the Attorney General may consider the submission on an expedited basis. Prompt notice of the request for expedited consideration will be given to interested parties registered in accordance with § 51.13. When a decision not to object is made within the 60-day period following receipt of a submission which satisfies the requirements of § 51.10(a), the Attorney General may reexamine the submission if additional information comes to his attention during the remainder of the 60-day period which would require objection in accordance with § 51.19.

§ 51.23 Reconsideration on request.

(a) If a submitting authority requests a conference to produce information not previously available to it in support of reconsideration of an objection by the Attorney General, a meeting shall be held at a location determined by the Attorney General.

(b) When a submitting authority requests that a conference be held concerning a change affecting voting to which the Attorney General has objected, individuals or groups that commented on the change prior to the Attorney General's objection or that seek to participate in response to any public or other notice of a request for reconsideration shall be notified and given the opportunity to confer.

(c) Such a conference shall be conducted by the Assistant Attorney General, Civil Rights Division, or his designee in an informal manner. Those present will be permitted to present facts in support of their positions.

(d) The Assistant Attorney General or the person he has designated to conduct the conference may, in his discretion, choose to hold separate meetings to confer with the submitting authority and interested groups or individuals.

§ 51.24 Decision after reconsideration.

An objection shall be withdrawn if the submitting authority can produce information not previously available to it which satisfies the Attorney General that the change does not have a racially discriminatory purpose or effect. The Attorney General shall notify the submitting authority within 60 days of the request for reconsideration (provided that the Attorney General shall have at least 15 days following any conference that is held in which to decide) of his decision to continue or withdraw an objection, giving the reasons for his decision. A copy of the notification shall be sent to any party that has commented on the submission or has requested notice of the Attorney General's action thereon.

§ 51.25 Withdrawal of objection.

Where there has been a substantial change in fact or law, the Attorney General may, if he deems it appropriate, withdraw an objection on his own motion if he determines that the objection is not in accord with the standard for decision in § 51.19. Notification of the withdrawal of an objection shall be sent to the submitting authority and to any party that commented on the submission or has requested notice of the Attorney General's action thereon.

§ 51.26 Records concerning submissions.

(a) Section 5 files: The Attorney General shall maintain a section 5 file for each submission, containing the submission, related written materials, correspondence notations concerning conferences with the submitting authority

or any interested individual or group and a copy of any letters from the Attorney General concerning his decision whether to object to a submission. Communications from individuals who have requested confidentiality or with respect to whom the Attorney General has determined that confidentiality is appropriate under § 51.12(c) shall not be included in the section 5 file. Investigative reports and internal memoranda shall not be included in the section 5 file.

(b) Chronological file: Brief summaries regarding each submission and the Department of Justice investigation and decision concerning it will be prepared when the decision whether to interpose an objection has been made. A chronological file of these summaries, arranged by the date upon which such decision is made will be maintained.

(c) The contents of the above-described section 5 and chronological files will be available for inspection and copying by the public during normal business hours at the Civil Rights Division, Department of Justice, Washington, D.C. Consistent with the Department of Justice regulation implementing the Public Information Section of the Administrative Procedure Act, 28 CFR 16.4, the fees for copying the contents of these files will be 50 cents for the first page and 25 cents for each additional page.

(d) The Attorney General may, at his discretion, call to the attention of the submitting authority or an interested individual or group information or comments related to a submission.

Subpart E—Petition To Change Procedures

§ 51.27 Petitioning party.

Any interested individual or group may petition to have these procedures amended by new provisions.

§ 51.28 Form of petition.

A petition under this subpart may be made by informal letter and shall state the name and address of the petitioner, the change requested and the reasons for requesting the change.

§ 51.29 Disposition of petition.

The Attorney General will consider a petition under this section and make a disposition thereof. Prompt notice, accompanied by a simple statement of the reasons, shall be given to the petitioner if the petition is denied in whole or in part.

APPENDIX C

[Not in Record of Proceedings Below]

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

August 3, 1979

Address Reply to the Division Indicated
and Refer to Initials and Number
DSD:JMC:JAS:gml
DJ 166-012-3

Mr. Joseph W. Dorn
2033 K. Street, N.W.
Suite 400
Washington, D.C. 20006

Dear Mr. Dorn:

This is in response to your request for statistics with respect to the administration of Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. The requested statistics are as follows:

Number of voting changes submitted to the Attorney General, 1965-June 30, 1979	25,964
Number of objections interposed by The Attorney General, 1965-June 30, 1979	347
Number of voting changes submitted to the Attorney General, January 1-June 30, 1979	3,258
Number of objections interposed by the Attorney General, January 1-June 30, 1979	7

If we can be of further assistance, please let us know.

Sincerely,

DREW S. DAYS III
Assistant Attorney General
Civil Rights Division

By: DAVID H. HUNTER
Attorney
Voting Section